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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

BY

C. A. PROUTY.

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JUDGES

OF THE

SUPREME COURT,

DURING THE TIME OF THESE REPORTS.

HON. JONATHAN ROSS, CHIEF JUDGE.

HON. RUSSELL S. TAFT,
HON. JOHN W. ROWELL,
HON. JAMES M. TYLER,
HON. LOVELAND MUNSON,
HON. HENRY R. START,
HON. LAFOREST H. THOMPSON,
} ASSISTANT JUDGES.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME

Accident Ins. Co., Billings v.... 78
Adams v. Sleeper 544
Agnew v. Dumas 147
Alexander v. Hanley..... 361
Albee's Estate, Conn. River Savings Bank v 571
Ames & Co. v. Melendy 554
Ames v. Dorset Marble Co. et al. 10
Austin v. Bailey & Putnam et al 367

Bailey et al., Mt. Mansfield Hotel Co. v..... 151
Bailey & Putnam et al., Austin v 367
Ballard v. Burton 387
Baker, Apt., v. Jacobs.. 197
Baker, State v..... 355
Banister v. Wakeman..... 203
Banister v. Ovitt... 580
Barre Rd. Co., Smith v..... 21
Bates v. Sabin.... 511
Beeman v. Cooper..... 305
Ben. & Rut. Ry. Co., Croft v.... 1
Billings v. Accident Ins. Co. 78
Bliss v. Little's Estate..... 133
Blair, Admr. v. Johnson's Heirs. 598
Boston & Maine Rd. Co., Reynolds v..... 66
Bradford, Pierce v.... 219
Bradley, State v..... 466
Braintree, Prince et al. v.... ... 540
Braintree, Ford v.... 144
Brighton v. Doyle et al..... 616
Britton, Legg, Jr., Admr. v.... 652
Burlington Savings Bank, Lewis & Leach, Assignees v..... 626
Burgess, et al., Parker v..... 442
Burn's Estate, Manghan v..... 316
Burton, Ballard, v..... 387

Camp, State v..... 295
Caldbeck, Roach v..... 593
Carpenter, Willey v.... 212
Caswell v. Caswell 557
Casavant, State v..... 405
Central Vt. Rd. Co., Worthington v..... 107
Coffin, State v..... 25
Conn. River Savings Bank v. Albee's Estate..... 571
Coolidge, Taylor v.. 506
Cooper, Beeman v..... 305
Cross v. Frost..... 179
Curtis v. Watson & Voodry..... 536
Curtis v. Watson..... 549
Cushman, Weybridge v..... 415
Croft v. Ben. & Rut. Ry. Co.... 1

Daggett v. Mendon..... 328
Dame & Co. v. Flint..... 533
Darling, Rudd v..... 456
Dean et al., Hilliard v..... 292
Dean et al., Hilliard v..... 294
Derrick v. Luddy, Apt..... 462
Deno v. Thomas..... 358
Dickerson et al., Foster's Exrs. v. 233
Dodge, Enright v..... 502
Dorset Marble Co. et al., Ames v. 10
Doyle et al., Brighton v.... 616
Dumas, Agnew v..... 147

Edwards, Page, Surviving Partner v..... 124
Enright, McCasker & Mallow v.. 488
Enright v. Dodge..... 502
Essex et al., Underhill v..... 28

Farewell, Stillwell v..... 286
Flint, Dame & Co. v..... 533
Ford v. Braintree.... 144
Foster's Exrs. v. Dickerson et al, 233
Frost, Cross v..... 179

Gay's Estate v. Hassom et al.... 495
Good v. Knox et al..... 97
Green v. Kelley..... 309
Griffith v. Hilliard..... 648
Gunning's Estate, Stevenson v.. 601

Hagan, Hathaway v. 135
Hall, Niles v. 453
Hanley, Sowles v. 412
Hanley, Alexander v. 361
Harwood v. Village of West Randolph. 41
Hasset, State v. 46
Hassom et al., Gay's Estate v. . . 495
Hathaway v. Hagan. 135
Hawley et al. v. Sheldon. 491
Hayes, Hunt v. 89
Hilliard, Griffith v. 643
Hilliard v. Dean et al. 292
Hilliard et al v. Dean et al. 294
Holmes v. Laraway. 175
Hubbard, Noyes v. 302
Hunt v. Hayes. 89
Hyde Park, Vershire v. 638

Jacobs, Baker, Apt. v. 197
Jericho v. Underhill. 362
Johnson v. Valido Marble Co. . . . 337
Johnson's Heirs et al., Blair, Admr., v. 598

Kelley, Green v. 309
Kendall v. Tracy et al. 522
Knox et al., Good v. 97

Laraway, Holmes v. 175
Laraway, Willey v. 559
Laraway, Willey v. 566
Lathrop v. Sunderland. 35
Legg, Jr., Admr. v. Britton. 652
Lewis & Leach, Assignees, v. Burlington Savings Bank. . . 626
Little's Estate, Bliss v. 133
Livingston, Norton v. 473
Luddy, Apt., Derrick v. 462
Lyman et al., Turner's Exr. v. . 167

Mathers, State v. 101
Maughan v. Burns' Estate. 316
McCole v. Varnum. 163
McCasker & Mallow v. Enright. . 488
McGowen et al., Park v. 173
McEwen v. Shannon & Co. 583
Melendy, Ames & Co. v. 554
Moon, Wilcox v. 450
Mendon, Daggett v. 323
Metropolitan Ins. Co., Walcott v 221
Mt. Mansfield Hotel Co. v. Bailey et al. 151

National Express Co., Winchell v. 15
Niles, Sisson v. 449
Niles v. Hall. 453
Newcomb et al., Reed v. 49
Norton v. Livingston. 473
Noyes v. Hubbard. 302
Noyes, French & Fickett v. Parker. 379

Ovitt, Banister v. 580

Page, Surviving Partner, v. Edwards. 124
Paine v. Webster. 105
Park v. McGowen et al. 173
Parker v. Burgess et al. 442
Parker, Noyes, French & Fickett v. 379
Pierce v. Bradford. 219
Potter v. Potter, Admr., et al. . . 298
Potter et al. v. Thompson. 427
Preston, Admr. v. St. J. & L. C. Rd. Co. 280
Prince et al. v. Braintree. 540

Randall et al., Randall's Admr. v 419
Ranney, Admr., v. St. J. & L. C. Rd. Co. 277
Re Robert T. Parson's Estate. . . . 193
Re Emma C. Buckman's Will. . . 313
Re Lucius Irish. 376
Re George Thorpe. 398
Read, Stilphen v. 400
Reed v. Newcomb et al. 49
Reynolds v. Boston & Maine Rd. Co. 66
Rich's Exrs. v. Sowles, Admr. . . 408
Roach v. Caldbeck. 593
Rounds, Rudd v. 432
Rudd v. Rounds. 432
Rugg and Wife v. Ward. 402
Rudd v. Darling. 456

Sabin, Bates v. 511
School Dist. No. 4 in Bethel v. School Dist. No. 2 in Stockbridge. 527
School Dist. No. 18 in Barre, Wheeler v. 184
Shannon & Co., McEwen v. 583
Sheldon, Hawley et al. v. 491
Sisson v. Niles. 449
Sleeper, Adams v. 544
Sowles, Admr., Rich's Exrs. v. . 408
Sowles v. Hanley. 412
Smith v. Barre Rd. Co. 21
Spaulding et al., Wing, Admr. v 83
State v. Coffin. 25
State v. Hassett. 46
State v. Mathers. 101
State v. Camp. 295
State v. Casavant. 405
State v. Bradley. 466

State v. Stevens 590
State v. Wheeler 569
State v. Baker 355
State v. White 372
St. J. & L. C. Rd. Co., Ranney, Admr. v 277
St. J. & L. C. Rd. Co., Preston, Admr. v 280
St J. & L. C. Rd. Co., Wead v. 52
Stetson et al. v. Stevens et al. ... 649
Stevens v. Gunning's Estate 601
Stevens, State v 590
Stevens et al., Stetson et al. v ... 649
Stillwell v. Farewell 286
Stilphen v. Reed 400
Stockbridge, Tinkham et al. v .. 480
Sunderland, Lathrop v 85

Taylor v. Coolidge 506
Thomas, Deno v 358
Thompson, Potter et al. v 427
Tinkham et al. v. Stockbridge .. 480
Tracy et al., Kendall v 522
Turner's Exr. v. Lyman et al. ... 167

Underhill v. Essex et al 28
Underhill, Jericho v 362

Valido Marble Co., Johnson v ... 337
Varnum, McCole v 163
Vershire v. Hyde Park 638
Village of West Randolph, Harwood v 41

Wager et al., Williams, Admr., v 326
Wakeman, Banister v 203
Wolcott v. Metropolitan Ins. Co. 221
Ward, Rugg and Wife v 402
Watson, Curtis v 549
Watson & Voodry, Curtis v 536
Wead v. St. J. & L. C. Rd. Co.. 52
Webster, Paine v 105
Weybridge v. Cushman 415
Wheeler v. School Dist. No. 18 in Barre 184
Wheeler, State v 569
White, State v 372
Wilcox v. Moon 450
Willey v. Laraway 559
Willey v. Laraway 566
Williams, Admr. v. Wager et al. 326
Willey v. Carpenter 212
Wing, Admr., v. Spaulding et al. 83
Winchell v. National Express Co. 15
Worthington v. Central Vt. Rd. Co. 107

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

ARRANGED BY COUNTIES.

GENERAL TERM.

Accident Ins. Co., Billings v.... 78
Agnew et al. v. Dumas..... 147
Ames v. Dorset Marble Co. et al. 10
Bailey et al., Mt. Mansfield Hotel Co. v..... 151
Baker, Apt. v. Jacobs..... 197
Barre Rd. Co., Smith v..... 21
Banister v. Wakeman..... 203
Ben. & Rut. Ry. Co., Croft v... 1
Billings v. Accident Ins. Co..... 78
Bliss v. Little's Estate..... 133
Boston & Maine Rd. Co., Reynolds v..... 66
Bradford, Pierce v..... 219
Braintree, Ford v..... 144
Brighton v. Doyle et al..... 616
Britton, Legg, Jr., Admr. v..... 652
Burlington Savings Bank, Lewis & Leach, Assignees v..... 626
Camp, State v..... 295
Carpenter, Willey v..... 212
Central Vt. Rd. Co., Worthington v..... 107
Coffin, State v..... 25
Croft v. Ben. & Rut. Ry. Co..... 1
Cross v. Frost..... 179
Dean et al., Hilliard v..... 292
Dean et al., Hilliard v..... 294
Dumas, Agnew et al. v..... 147
Dorset Marble Co. et al., Ames v. 10
Dickerson et al., Foster's Exrs. v. 233
Doyle et al., Brighton v..... 616
Edwards, Page v..... 124
Essex and Williston, Underhill v. 28
Farewell, Stillwell v..... 286
Ford v. Braintree..... 144
Foster's Exrs. v. Dickerson et al. 233
Frost, Cross v..... 179
Good v. Knox et al..... 97
Griffith v. Hilliard..... 648
Harwood v. Village of West Randolph..... 41
Hassett, State v..... 46
Hathaway v. Hagan..... 135
Hayes, Hunt v..... 89
Hilliard, Griffith v..... 633
Hilliard v. Dean et al..... 294
Hilliard v. Dean et al..... 292
Holmes v. Laraway..... 175
Hunt v. Hayes..... 39
Hyde Park, Vershire v..... 648
Jacobs, Baker, Apt. v..... 197
Knox et al., Good v..... 97
Laraway, Holmes v..... 175
Lathrop v. Sunderland..... 35
Legg, Jr., Admr. v. Britton..... 652
Lewis & Leach, Assignees v. Burlington Savings Bank... 626
Little's Estate, Bliss v..... 133
Lyman et al., Morse, Exr. v.... 167
Mathers, State v..... 101
McCole v. Varnum..... 163
McGowen et al., Park v..... 173
Metropolitan Life Ins. Co., Walcott v..... 221
Morse, Exr. v. Lyman et al..... 167
Mt. Mansfield Hotel Co. v. Bailey et al..... 151
National Express Co., Winchell v. 15
Newcomb and wife, Reed v..... 49
Page v. Edwards..... 124
Paine v. Webster..... 105
Park v. McGowen et al..... 173
Pierce, Bradford v..... 219
Preston. Admr. v. St. J. & L. C. Rd. Co..... 280

GENERAL TERM.—*Continued.*

Ranney, Admr. v. St. J. & L. C. Rd. Co. 277
Reed v. Newcomb and Wife 49
Re Robert T. Parson's Estate 193
Reynolds v. Boston & Maine 66
School Dist. No. 13 in Barre, Wheeler et al. v 184
Smith v. Barre Rd. Co. 21
Spaulding et al., Wing, Admr. v. 83
State v. Coffin 25
State v. Hassett 46
State v. Mathers 101
State v. Camp 295
Stevens et al., Stetson et al. v 649
Stetson et al. v. Stevens et al 649
Stillwell v. Farewell 286
St. J. & L. C. Rd. Co., Preston, Admr., v 280
St. J. & L. C. Rd. Co., Ranney, Admr., v 277
St. J. & L. C. Rd. Co., Wead v 52
Sunderland, Lathrop v 35
Underhill v. Essex and Williston 28
Varnum, McCole v 163
Vershire v. Hyde Park 633
Village of West Randolph, Harwood v 41
Wakeman, Banister v 202
Walcott v. Metropolitan Life Ins. Co. 221
Wead v. St. J. & L. C. Rd. Co. 52
Webster, Paine v 105
Winchell v. National Express Co. 15
Wheeler et al. v. School Dist. No. 13 in Barre 184
Willey v. Carpenter 212
Wing, Admr., v. Spaulding et al. 83
Worthington v. Central Vt. Rd. Co. 107

RUTLAND COUNTY.

Beeman v. Cooper et al 305
Burns' Estate, Maughan v 316
Cooper et al., Beeman v 305
Daggett v. Mendon 323
Green v. Kelley 309
Hubbard, Noyes v 302
Johnson v. Valido Marble Co. 337
Kelley, Green v 309
Maughan v. Burns' Estate 316
Mendon, Daggett v 323
Noyes v. Hubbard 302
Potter v. Potter 298
Re Emma C. Buckman's Will 313
Valido Marble Co., Johnson v 337
Wager et al., Williams, Admr., v. 326
Williams, Admr., v. Wager 326

FRANKLIN COUNTY.

Ballard v. Burton 387
Burton, Ballard v 387
Casavant, State v 405
Hanley, Sowles v 412
Noyes et al. v. Parker 379
Parker, Noyes et al. v 379
Read, Stilphen v 400
Re Geo. W. Thorpe 398
Rich's Exrs. v. Sowles, Admr., 408
Rugg and Wife v. Ward 402
Sowles v. Hanley 412
Sowles, Admr., Rich's Exrs. v 408
State v. Casavant 405
Stilphen v. Read 400
Ward, Rugg and Wife v 402

ADDISON COUNTY.

Cushman, Weybridge v 415
Randall, Admr., v. Randall et al. 419
Weybridge v. Cushman 415

CHITTENDEN COUNTY.

Alexander v. Hanley 361
Austin v. Bailey & Putnam et al. 367
Bailey & Putnam et al., Austin v. 367
Baker, State v 355
Deno v. Thomas 358
Hanley, Alexander v 361
Jericho v. Underhill 362
Re Lucius Irish 376
State v. Baker 355
State v. White 372
Thomas, Deno v 358
Underhill, Jericho v 362
White, State v 372

WINDHAM COUNTY.

Albee's Estate, Conn. River Savings Bank v. 571
Conn. River Savings Bank v. Albee's Estate 571

BENNINGTON COUNTY.

Burgess et al., Parker v. 442
Bradley, State v. 466
Darling, Rudd v. 456
Derrick v. Luddy, Apt. 462
Hall, Niles v. 453
Luddy, Apt., Derrick v. 462
Livingston, Norton v. 473
Moon, Wilcox v. 450
Niles, Sisson v. 449
Niles v. Hall 453
Norton v. Livingston 473
Parker v. Burgess et al. 442
Potter et al. v. Thompson 427
Rounds, Rudd v. 432
Rudd v. Rounds 432
Rudd v. Darling 456
Sisson v. Niles 449
State v. Bradley 466
Thompson, Potter et al. v. 427
Wilcox v. Moon 450

WINDSOR COUNTY.

Bates v. Sabin 511
Coolidge, Taylor v. 506
Dame v. Flint 533
Dodge v. Enright 502
Enright, Dodge v. 502
Enright, McCasker & Mallow v. 488
Flint, Dame v. 533
Gay's Estate v. Hassom et al. 495
Hawley et al. v. Sheldon 491
Hassom et al., Gay's Estate v. 495
Kendall v. Tracy et al. 522
McCasker & Mallow v. Enright. 488
Sabin, Bates v. 511
School Dist. No. 4 in Bethel v. School Dist. No. 2 in Stockbridge 527
Sheldon, Hawley et al. v. 491
Stockbridge, Tinkham et al. v. 480
Taylor v. Coolidge 506
Tinkham et al. v. Stockbridge 480
Tracy et al., Tinkham et al. v. 522

ORANGE COUNTY.

Adams v. Sleeper 544
Ames & Co. v. Melendy 554
Braintree, Prince et al. v. 540
Curtis v. Watson and Voodry 536
Curtis v. Watson 549
Melendy, Ames & Co. v. 554
Prince et al. v. Braintree 540
Sleeper, Adams v. 544
Watson and Voodry, Curtis v. 536
Watson, Curtis v. 549

CALEDONIA COUNTY.

Blair, Admr. v. Johnson's Heirs et al. 598
Caldbeck, Roach v. 593
Gunning's Estate, Stevenson v. 601
Johnson's Heirs et al., Blair, Admr., v. 598
Roach v. Caldbeck 593
Stevenson v. Gunning's Estate 601

WASHINGTON COUNTY.

Caswell v. Caswell 557

LAMOILLE COUNTY.

Laraway, Willey v. 559
Laraway, Willey v. 566
Wheeler, State v. 569
Willey v. Laraway 559
Willey v. Laraway 566
State v. Wheeler 569

ORLEANS COUNTY.

Banister v. Ovitt 580
McEwen v. Shannon & Co. 583
Ovitt, Banister v. 580
Shannon & Co., McEwen v. 583
State v. Stevens 590
Stevens, State v. 590

A TABLE

OF THE

NAMES OF THE CASES CITED IN THE OPINIONS OF THE COURT.

Adkins v. Col. L. Ins. Co., 70 Mo. 27 80
Adams v. Waggoner, 33 Ind. 53 .. 217
Adams v. Adams, 21 Vt. 162 321
Adams v. Hyde, 27 Vt. 221 549
Adamson v. Jarvis, 6 Bing. 66 .. 582
Aikin v. Bridgeman, 37 Vt. 249 .. 520
Alger v. Curry, 40 Vt. 437 532
Allen v. Gray, 11 Conn. 103 211
Albee v. Wark, 8 Mass. 84 211
Allen v. Rice, 24 Vt. 647 134
Amy v. Dubuque, 98 U. S. 470 .. 157
Anonymous Salk. 50 374
Andrew v. Andrew, 62 Vt. 495 .. 304
Appeal of Dale, 57 Conn. 127 265
Armstrong v. Noble, 55 Vt. 428 .. 251
Attorney General v. Henderson, 3 Anstruther 714 375
Atwood v. Cobb, 16 Pick. 227 390
Attersoll v. Stevens, 1 Taunt. 198 562
Austin v. Imus et al., 23 Vt. 286 153

Bacon v. Jones, 4 Mylne & Craig. 433 646
Baird and Wife v. Fletcher, 50 Vt. 603 300
Baker v. Bolton, et al., 1 Camp. 493 657
Baker v. Ufford, 63 Vt. 133 253
Baker's Exrs. v. Kilgore, 145 N. S. 487 455
Bank of Middlebury v. Rutland, 33 Vt. 414 190
Bank of Bellows Falls v. Dorset Marble Co., 61 Vt. 106 396
Bank of Newbury v. Richards et al., 35 Vt. 284 396
Banister v. Wakeman, 64 Vt. 203 460
Bank v. Crocker, 111 Mass. 163 .. 535
Bank of New Haven v. Perkins, 86 Am. Dec. 332 588
Barnes v. Dow, 59 Vt. 530 142
Barholt v. Wright, 45 Ohio St. 177 217
Bartlett v. Cabot, 54 Vt. 242 246
Barron v. Barron, 24 Vt. 375 300
Barron v. Barron et al., 24 Vt. 275 333
Bartlett v. Pickersgill, Eden 515 335
Bardwell v. Jamaica, 15 Vt. 438 .. 483
Barrett, Admr., v. Prentiss et al., 57 Vt. 297 500
Barnes v. Dow, 59 Vt. 530 646
Barry v. Harris, 49 Vt. 392 646
Bates v. Sharon, 45 Vt. 474 470
Batchelder v. Jenness, 59 Vt. 104 166
Bazeley v. Forder, 9 B. & S. 599 .. 94
Beard v. Murphy, 37 Vt. 99 251
Bellows v. Sowles, 59 Vt. 63 315
Bent v. Bent, 44 Vt. 555 300
Berlin v. Worcester, 50 Vt. 28 641
Bigelow v. Berk. L. Ins. Co., 93 U. S. 284 82
Bill v. Dow, 56 Vt. 562 549
Blanchard v. Waters, 10 Met. 185 211
Blanchard v. Manahan, 44 Vt. 246 385
Blanchard v. Blanchard, 122 Mass. 558 498
Blaisdel v. Locke, 52 N. H. 238 .. 578
Blodgett v. Hildreth, 103 Mass. 484 338
Board of Freeholders v. Strader, 3 Harrison (N. J.) 108 483
Bonnett v. Stowell, 37 Vt. 258 589
Bowen v. King, 34 Vt. 156 38
Bourresean v. Detroit Evening Journal Co., 68 Mich. 425 478
Bowers v. Smith, 10 Paige 193 169
Bowman v. Gonegal, 19 La. Ann. 328 588
Boyd v. Barclay, 34 Am. Dec. 762 587
Boyd v. Frieze, 5 Gray 554 394
Bottsford v. Burr, 2 Johns. Ch. Law Ed. 405 333
Boutell v. Fire Ins. Co., 51 Vt. 4 251
Boulter v. Clark, Bull N. P. 16 .. 216
Bradley v. Fisher, 1 Wall. 335 208

Brainerd v. Peck, 34 Vt. 496.... 182
Brackett v. Wait, 6 Vt. 411..... 250
Bradley v. Andrews, 51 Vt. 525. 252
Bradley v. Snyder, 14 Ill. 263... 371
Bradley Fertilizer Co. v. Fuller, 58 Vt. 315..... 491
Bradstreet v. Bank of Royalton, 42 Vt. 128..... 518
Bradish v. Bliss, 35 Vt. 326..... 613
Brackett v. Wait, 6 Vt. 411..... 578
Bremridge v. Latimer, 12 W. R. 878..... 477
Brison v. Brison, 75 Cal. 525.... 233
Briggs v. Taylor, 28 Vt. 180..... 114
Briggs v. Wardwell, 10 Mass. 356 211
Brownell v. T. & B. Rd. Co., 55 Vt. 218..... 253
Brown v. Caldwell, 10 Serg. & Rawle 114..... 259
Buchanan v. Paddleford, 43 Vt. 64..... 426
Buffington v. Curtis, 15 Mass. 528 535
Bullard v. Billings, 2 Vt. 309.... 578
Burr v. Wilcox, 13 Allen 273.... 394
Burnham v. Adams, 5 Vt. 313.... 288
Burton v. Stevens, 24 Vt. 131... 497

Calkins v. Chandler, 36 Mich. 320 392
Camden & Atlantic Rd. Co. v. Hoosey, 99 Pa. St. 492..... 121
Campbell v. Scott, 11 Simons 31. 646
Carey v. Berkshire Rd. Co., 48 Am. Dec. 616-632..... 657
Carey v. Berkshire Rd. Co., 48 Am. Dec. 637..... 659
Carpenter v. Moore, 43 Vt. 392.. 589
Carpenter v. McClure, 40 Vt. 108 214
Castle v. Bullard, 23 How. 172, 186..... 490
Catlin v. Laman, 16 Vt. 44..... 153
Chapman v. Goodrich, 55 Vt. 354 516
Chapman v. Rep. L. Ins. Co., 6 Biss. 238..... 82
Chickering v. Brooks, 61 Vt. 554 244
Chittenden v. School Dist. in Waterbury, 56 Vt. 551..... 529
Chittenden v. Stockbridge, 63 Vt. 308..... 640
Chittenden v. Barnard, 61 Vt. 145 639
Clark v. Clark, 43 Vt. 685..... 333
Clark v. Eighth Avenue Rd. Co., 36 N. Y. 135..... 118
Clark v. Twombly et al., 19 Vt. 48..... 303
Clark v. Holden, 74 Gray 855.... 562
Clary v. McGlynn, 46 Vt. 347.... 404
Clary v. Willey, 49 Vt. 55..... 252
Cleveland v. Creviston, 93 Ind. 31 159
Clifford v. Laton, 3 C. & P. 15.. 95
Codman v. Vt. & Can. Rd. Co., 16 Blatch. 165..... 156
Coltraine v. McCain, 3 Dev. 308. 211
Commonwealth v. Norfolk, 5 Mass. 435..... 542
Commonwealth v. Dana, 2 Met. 329, 337..... 103
Commonwealth v. Gillespie, 146 Pa. 546..... 518
Commonwealth v. Colberg, 119 Mass. 350..... 217
Comstock v. Droham, 71 N. Y. 9 311
Connolly v. Knickerbocker Ice Co. 114 N. Y. 104..... 119
Conkhite v. Travelers' Ins. Co., 75 Wis. 116..... 228
Conn. & Pass. R. Rd. Co. v. Baxter, 32 Vt. 805..... 253
Conn. & Pass. R. Rd. Co. v. Baxter, 32 Vt. 812..... 270
Cook v. Champlain Transportation Co., 1 Denio 91..... 562
Corliss & Way v. Grow, 58 Vt. 702 498
Cram v. Cram, 23 Vt. 15..... 244
Crane v. Northfield, 33 Vt. 124.. 470
Crocker v. Chase, 57 Vt. 420..... 263
Cross v. Mann, 53 Vt. 501..... 140
Currier v. Boston & Maine Rd. Co., 7 Gray 8..... 562

Dale v. See, 51 N. J. Law 378-14 555
Dalrymple v. Whitingham, 26 Vt. 345..... 542
Dana & Hayden v. Binney & Morrison, 7 Vt. 493..... 370
Danforth v. Streeter, 28 Vt. 490. 440
Daniels v. The Inhabitants and Wardens of Athens, 55 Ga. 609..... 484
Darling v. Wilson, 60 N. H. 59.. 503
Davis v. Smith, 48 Vt. 52..... 516
Davis v. Bradley, 28 Vt. 118..... 535
Davies v. Mut. B. L. Ins. Co., 87 Ken. 541..... 80
Davenport v. Shants & Co. et al., 43 Vt. 546..... 131
Davis & Whitaker v. Field, 56 Vt. 426..... 336
De Gogorza v. Knick. Life Ins. Co., 65 N. Y. 232..... 82
De Havilland v. Bowerbank, 1 Campb. 50..... 156
De Valengin v. Duffy, 14 Pet. 289..... 411
Dewey v. Dewey, 35 Vt. 555..... 333
Dickerman v. Ray, 55 Vt. 65..... 293
Doon v. Ravey, 49 Vt. 293..... 384
Downer v. Rowell, 26 Vt. 397.... 303
Downs v. Belden, 46 Vt. 674..... 583

Doyle v. Dixon, 97 Mass. 213.... 394
Driggs v. Burton, 44 Vt. 124.... 385
Durgin v. Danville, 47 Vt. 95.... 384
Duke of Beaufort v. Morris 6, Hare 340.... 646
Dwinell v. Bliss, 58 Vt. 353.... 141

Eames v. Brattleboro, 54 Vt. 271 252
Earl v. Tupper, Ibid 275.... 597
Eastman v. Premo, 49 Vt. 355.... 491
Eastland v. Burchell, L. R. 3 Q. B. D. 432.... 95
Edgell v. Legerson, 26 Mo. 583.. 159
Edgell v. Bennett, 7 Vt. 534.... 315
Edgell v. Bennett, 7 Vt. 534.... 578
Ellison v. Ellison, 1 Lead. Cas. Eq. (3d Am. Ed. 297).... 576
Elton v. Johnson, 16 Conn. 253.. 391
Emery v. Fowler, 39 Me. 326-63 582
Emmons v. Cairns, 3 Sand. Ch. 369.... 169
Erhardt v. Boaro et al., 45 N. Y. 703.... 644
Estabrooks v. Prentiss, 34 Vt. 457 517
Evans v. Sanders, 8 Port 497.... 390
Ex Parte Bain, 21 U. S. 1.... 373

Falls Village Water Power Co. v. Tebbetts, 31 Conn. 165.... 644
Fairchild v. Bascomb, 35 Vt. 416 271
Farmers etc. Bank v. Champlain Transportation Co., 23 Vt. 206.... 353
Fay v. Munson, 40 Vt. 468.... 567
Fay v. Brewer, 3 Pick. 203.... 562
Field v. Hamilton, 45 Vt. 35.... 311
Filer v. New York Central Rd. Co., 49 N. Y. 47.... 115
First National Bank v. County Commissioners, 14 Minn. 77 154
Fire Association v. Bank, 54 Vt. 657.... 613
Fisher v. Heming, Phil. Ev. 147. 108
Floyd v. Barker, 12 Coke 24.... 208
Floyd v. Mostyn, 10 M. & W.... 478
Foote et al. v. Dickinson, 2 Met. 611.... 563
Ford v. Braintree, 64 Vt. 144.... 484
Foster Will Case, 64 Vt. 233.... 314
Fraray v. Gusha, 59 Vt. 257, 255, 274
Francis v. Lathrope, 2 Tyler 372 321
Fray v. Blackburn, 3 Best & S. 576.... 208
Freeman v. Trav. Ins. Co., 144 Mass. 572.... 228
Freeman v. Kelley, 1 Hoff. 90.. 331
French v. Barre, 58 Vt. 567.... 544
French v. Howard, 14 Ind. 455.. 159
Funk v. Pond, 64 Wis. 35.... 503

Futton v. Wiley, 32 Vt. 762.... 178

Gale v. Lincoln, 11 Vt. 152.... 384
Gardner v. McMahon, 3 Q. B.... 498
Gavett v. Manchester & Lawrence Rd. Co., 16 Gray 501.. 116
Gerrish v. Bragg, 55 Vt. 329.... 563
Gerrish v. Bank, 128 Mass. 159.. 576
Gibbs v. Williams, 25 Kan. 214. 494
Gibson v. Vial, 53 Vt. 476.... 252
Gifford v. Thomas' Estate, 62 Vt. 34.... 250
Gilbert v. Gilbert, 22 Ala. 529.... 265
Gill v. Read, 5 R. I. 343.... 96
Gilman v. Strafford, 50 Vt. 723. 272
Gilchrist v. Bale, 8 Watts 355.... 440
Gillett v. Johnson, 30 Conn. 180. 494
Goldsmith's Admr. v. Joy, 61 Vt. 488.... 215
Godding, Admr. v. Orcutt, 44 Vt. 54.... 512
Good v. Lehan, 8 Cush. 301.... 366
Goodrich v. Mott, 9 Vt. 395.... 521
Goodrich v. Drew, 10 Vt. 237.... 431
Gordon v. Potter, 17 Vt. 348.... 96
Gordon v. Tabor, 5 Vt. 103.... 384
Gray v. Middletown, 56 Vt. 53.. 543
Grafton Bank v. Doe et al., 19 Vt. 463.... 159
Graham v. Todd, 9 Vt. 166.... 210
Grafton Bank v. Doe et al., 19 Vt. 463.... 153
Graville v. Manhattan Rd. Co., 105 N. Y. 525.... 118
Gregory v. Thomas, 20 Wend. 17 370
Gregory v. Atkins, 42 Vt, 237.... 478
Greensborough v. Underhill, 12 Vt. 604.... 613
Greeno v. Munson, 9 Vt. 37.... 464
Griggs v. Seldon, 58 Vt. 561.... 20
Gunnison v. Bancroft, 11 Vt. 490 390

Hadley v. Carter, 8 N. H. 40.... 439
Hakes v. Hotchkiss, 23 Vt. 235.. 392
Halloran v. Whitcomb, 43 Vt. 306.... 578
Hall v. Dewey, 10 Vt. 593.... 464
Harrison v. Grady, 13 L. T. N. S. 369.... 92
Harrigan v. Bacon, 57 Vt. 644.. 141
Harrington v. McNaughton, 20 Vt. 293.... 303
Hard v. Burton, 62 Vt. 314.... 320
Harrington v. School Dist. in Alburg, 30 Vt. 155.... 530
Harding V. Townshend, 43 Vt. 541.... 655
Haskell v. Bowen, 44 Vt. 579.... 519
Hastings, Admr. v. Perry et al., 20 Vt. 218.... 646

Hathaway v. National Life Ins. Co. 48 Vt. 335 244
Hathaway v. National Life Ins. Co. 48 Vt. 335 244
Hathaway v. Hagan, 59 Vt. 75 .. 139
Hayden v. Rice, 18 Vt. 353 521
Hayward Rubber Co. v. Dunck-lee, 30 Vt. 29 578
Heartley v. Nicholson, L. R. 19 Eq. 233 576
Heyer v. Pruyn, 7 Paige 465 526
Hickey v. Boston & Lowell Rd. Co., 14 Allen 429 119
Hicks & Co. v. Cram et al., 17 Vt. 449 449
Hickok v. Farmers' and Mechan-ics' Bank et al., 35 Vt. 476 .. 500
Hill v. Bateman, 1 Strange 710 .. 211
Hill v. Beebe, 13 N. Y. 556 370
Hoadley v. Watson, 45 Vt. 289 .. 597
Hoggart v. Cutts, Cr. & Ph. 197 . 86
Holmes v. Holmes, 26 Vt. 536 ... 321
Hollister v. York et al., 59 Vt. 1 500
Hollister v. York et al., 59 Vt. 1 525
Houghton v. Swarthout, 1 Denio 589 211
Houghton v. Paine's Estate, 29 Vt. 58 521
Hough v. Barton, 20 Vt. 455 578
Howe v. Buffalo, New York & Erie Rd. Co., 37 N. Y. 297 .. 582
Howe v. Bradley, 19 Me. 31 154
Howe v. Taggart, 133 Mass. 284 . 391
Howland v. Day, 56 Vt. 318 218
Hughes v. Edwards, 9 Wheat. 489 526
Hull v. Fuller, 7 Vt. 100 404
Hunter v. Cooperstown etc. Rd. Co., 112 N. Y. 371 114
Hunt v. Bennett, 19 N. Y. 173 .. 478
Hutchinson v. Sartweller, 31 N. J. Eq. 205 370
Hutchinson v. Granger, 13 Vt. 386 447
Hutchinson v. Ford, 62 Vt. 97 .. 520

Indianapolis etc. Rd. Co. v. Wat-son, 114 Ind. 20 116
Ingraham v. Dunnell et al., 5 Met. 118 646
Irwin v. Dixon et al., 9 Howard 28 644
Ins. Co. v. Wells, 53 Vt. 14 425
Ins. Co. v. Cummings, 11 Vt. 503 211
Ivat v Finch, 141 Taunt. 1 579

Jamaica v. Hart, 52 Vt. 549 464
Jennings v. Napanee Brush Co., Law Jour. Vol. 20, No. 19 .. 156
Johnson v. Central Vt. Rd. Co., 56 Vt. 707 255
Johnson v. Central Vt. Rd. Co., 56 Vt. 707 274
Johnson v. Nash, 20 Vt. 40 410
Johnson v. Sumner, 3 H. & N. 261 93
Jones v. Lock, L. R. 1 Ch. 25 ... 576
Jones v. Tuttle, 54 Vt. 488 410
Jones v. Elliot, 35 Me. 137 211
Jordan v. Lewis, H. 13 Geo. 2 B. R. 102
Joslyn v. Grand Trunk Ry. Co., 51 Vt. 92 535
Judevine v. Goodrich, 35 Vt. 19 . 390
Judy v. Louderman, 48 Ohio St. 562 394

Keeser v. Smith, 71 Ala. 481 216
Kelsey v. Kelley and Wife, 63 Vt. 41 308
Kekewich v. Manning, 1 De G. M. & G. 176 576
Kendall v. Sampson, 12 Vt. 515 . 503
Kendall v. Randall et al., 55 Vt. 214 140
Kendall v. Powers, 4 Met. 553 .. 211
King v. Ham, 6 Allen 298 360
King v. Upton, 4 Me. 387 391
Knight v. Smythe, 57 Vt. 529 ... 470
Knight v. Smythe, 57 Vt. 532 ... 253
Kopper v. Dyer, 63 Vt. 481 451
Kopper v. Dyer, 59 Vt. 477 141
Kopper v. Dyer, 59 Vt. 477 325
Kopper v. Dyer, 59 Vt. 477 352

Labaree v. Wood, 54 Vt. 452 582
Lange & Benedict, 73 N. Y. 12 .. 208
Langdon v. Templeton, 61 Vt. 119 644
Lapham v. Kelley, 35 Vt. 195 ... 521
Lapham v. Kelley, 35 Vt. 195 ... 336
Lapham v. Kelley, 35 Vt. 195 ... 289
Latremouille v. Ben. & Rut. Ry. Co., 63 Vt. 336 106
Latremouille v. Ben. & Rut. Ry. Co., 63 Vt. 336 385
Latremouille v. Ben. & Rut. Ry. Co., 63 Vt. 336 230
Lazell v. Houghton, 32 Vt. 579 .. 431
Learned v. Bellows, 8 Vt. 79 432
Leach v. Peabody, 58 Vt. 485 ... 303
Leach v. Leach, 51 Vt. 440 303
Legatt v. Tollervey, 14 East 302 . 103
Leland v. Farnham, 25 Vt. 553 .. 578
Lester v. Pittsford, 7 Vt. 158 244
Lewis v. Chapman, 16 N. Y. 369 478
Lickbarrow v. Mason, 1 Smith's Lead. Cas. (6th Am. Ed.) 1082, 1095 535

Liddlow v. Wilmot, 2 Star. 86 ... 94
Lindsey v. Lindsey, 11 Vt. 621 .. 230
Livermore v. Aldrich et al., 5 Cush. 431 332
Litson v. Brown, 24 Ind. 489 95
Livermore v. Jamaica, 23 Vt. 361 542
Livingston v. Mott, 2 Wend. 605 561
Livingston v. Livingston, 6 Johns. Ch. (Law Ed.) 496 ... 644
Longey v. Leach, 57 Vt. 377 503
Londonderry v. Peru, 45 Vt. 424 543
Lovell v. Field, 5 Vt. 218 411
Lucas v. New Bedford & Taunton Rd. Co., 6 Gray 64 259
Lunay v. Vantyne, 40 Vt. 501 .. 220
Lycoming Fire Ins. Co. v. Wright, 60 Vt. 515 61
Lyman v. Turner's Exr., 62 Vt. 465 171
Lyon v. McLoughlin, 32 Vt. 423 646
Macomber v. Godfrey, 108 Mass. 219 494
Mallory v. Travelers' Ins. Co., 47 N. Y. 52 228
Manufacturers' Bank of Troy v. Scofield, 39 Vt. 590 500
Manhattan Hardware Co. v. Phalen, 128 Pa. 110 530
Martin v. Wells, 43 Vt. 428 432
Martin v. Bowker, 19 Vt. 526 .. . 497
Martin v. Funk, 75 N. Y. 134 .. 576
Marcy v. Amazeen, 61 N. H. 131 578
Martin v. Hurlburt, 60 Vt. 364 .. 220
Martin v. Martin, 1 Vt. 91 588
Mason v. Fuller, 45 Vt. 29 247
McNeish v. U. S. Hulless Oat Co., 57 Vt. 316 516
McOrmsby v. Morris, 29 Vt. 417 . 567
McDaniels v. Harbour, 43 Vt. 460 139
McMillan v. Richards, 9 Cal. 419 142
McCue v Klein, 60 Tex. 168 217
McNeish v. U. S. Hulless Oat Co., 57 Vt. 316 253
McGowen v. West, 7 Mo. 569 .. . 259
Merrill v. Railroad Co., 54 Vt. 200 140
Melendy v. Spaulding, 54 Vt. 517 252
Middlebury v. Waltham, 6 Vt. 200 641
Middlebury v. Rutland, 33 Vt. 414 190
Milroy v. Lord, 4 De G. F. & J. 264 576
Minor v. Rogers, 40 Conn. 512 ... 576
Minot v. Mitchell, 30 Ind. 228 . . 259
Minot v. Taylor, 129 Mass. 160 .. 170
Missisquoi Bank v. Evarts, 45 Vt. 293 384
Montpelier & Wells River Rd. Co. v. Langdon, 45 Vt. 137 .. 500
Montgomery v. Edwards, 45 Vt. 75 560
Moore v. McKenney, 83 Me. 80 .. 391
Moore v. Beattie, 33 Vt. 219 531
Morrill v. Noyes, 56 Me. 458 503
Morrison v. Erie Ry. Co., 56 N. Y. 302 115
Morse v. Crawford, 17 Vt. 499 .. 244
Morse v. Low, 44 Vt. 561 315
Morse v. Lyman, 64 Vt. 167 600
Mosley v. Ins. Co., 55 Vt. 142 ... 609
Mt. Holly etc. Turnpike Co. v. Ferree et al., 17 N. J. Eq. 117 87
Munster v. Lamb, 28 Alb. Law Jour. 445 208
Murphy v. Lincoln et al., 63 Vt. 278 645
Mut. Ins. Co. v. Deale, 18 M. D. 26 578
Myers v. Lyon, 51 Vt. 272 410

Nason v. Blaisdell, 12 Vt. 165 ... 563
Nason v. Dinsmore, 34 Me. 391 .. 518
National Bank v. Dearborn, 115 Mass. 219 535
National Bank v. Weeks, 53 Vt. 115 411
National Bank of North America v. Kirby, 108 Mass. 497 . 153
Needham v. Grand Trunk Ry. Co., 38 Vt. 294 655
New Haven v. Middlebury, 63 Vt. 399 640
Newcomb v. Railroad, 115 Mass. 230 535
Nolan v. Brooklin, City etc. Rd. Co., 87 N. Y. 63 118
Noxon v. Hill, 2 Allen 215 211
Noyes v. Rockwood, 56 Vt. 647 . 230
Noyes v. Canfield, 27 Vt. 79 250
Noyes v. Turnpike Co., 11 Vt. 531 284

Ohio L. I. & T. Co. v. M. I. & T. Co., 11 Hump. 1 587
Onion v. Clark, 18 Vt. 363 214
Orcutt v. Cook, 37 Vt. 517 220
Orleans County Gram. School v. Parker, 25 Vt. 703 464
Ovitt v. Chase, 37 Vt, 196 531

Packard v. Kingman, 11 Iowa 219 370
Paddock v. Fletcher, 42 Vt. 389 . 587
Page v. Mitchell, 13 Mich. 63 .. . 510
Paine v. Tilden, 20 Vt. 554 609
Parker v. Chase and Buck, 62 Vt. 206 503
Partch v. Spooner, 57 Vt. 383 ... 253
Parks v. Ross, 11 Howard (U. S.) 372 230

Parks' Admr. v. American H. Mis. Soc., 62 Vt. 19 182
Patch et ux. v. Keeler et al., 28 Vt. 332 404
Peach v. Mills, 13 Vt. 501 366
Penn. Township v. Perry Countp, 78 Pa. St. 457 484
Pechey v. Harrison, 1 Ld. Raym. 232 385
People v. Call, 1 Denio 120 259
People v. Aikin, 66 Mich. 460 ... 272
Perry v. Whipple, 38 Vt. 278 ... 411
Pettingell v. Elkins, 50 Vt. 431 .. 384
Pierce, Admr. v. Whitman, 23 Vt. 626 39
Pierce, Admr. v. Travelers' Ins. Co., 34 Wis. 389 82
Pierson v. Clayes et al., 15 Vt. 93 325
Pierce v. Bradford, 64 Vt. 219 ... 518
Pinnock v. Clough, 16 Vt. 500 ... 333
Pinney v. Fellows, 15 Vt. 525 ... 333
Pingry v. Watkins, 17 Vt. 379 .. 404
Pittock v. O'Niel, 63 Pa. St. 253 . 478
Pittsford v. Chittenden, 44 Vt. 382 641
Pope v. Stacy, 28 Vt. 96 520
Pope v. Bank, 56 Vt. 284 576
Powell v. Deming, 22 Hun. 235 . 170
Powers v. Woodstock, 38 Vt. 44 . 484
Pratt v. Paige, 32 Vt. 13 372
Pratt v. Gardner, 2 Cush. 63 207
Preble v. Supervisors, 8 Bis. 358 . 159
Prior v. Wilbur, 63 Vt. 407 430
Prouty v. Wilson, 123 Mass. 297 . 391
Putnam & Co. v. French & Moore, 2 Vt. 402 20

Randall v. Josselyn, 59 Vt. 557 .. 172
Randall v. Brigham, 7 Wall. 523 . 207
Randall v. Randall, 55 Vt. 214 140
Ranney, Admr. v. St. J. & L. C. Rd. Co., 64 Vt. 277 283
Railroad Co. v. Bixby, 57 Vt. 548 321
Rawlyns v. Vandyke, 3 Esp. 250 96
Rawson v. Prior, 57 Vt. 612 253
Ray v. Simmons, 11 R. I. 266 576
Read v. Great Eastern Ry. Co., 9 Best & S. 277 359
Read v. Legard, 6 Exch. 636 92
Reed v. Shepley, 6 Vt. 602 464
Re Barre Water Co., 62 Vt. 27 ... 182
Re Kennedy, 55 Vt. 1 209
Re Henry Blood's Will, 62 Vt. 364 244
Re Merrill Bingham, 32 Vt. 329 . 303
Re Powers, 25 Vt. 261 377
Re Hardigan, 57 Vt. 100 377
Re Jesse Cooper, 32 Vt. 253 460
Re Chickering, 56 Vt. 82 500
Re Gaffney's Estate, 146 Pa. 46 . 576
Reley v. McInlear's Estate, 61 Vt. 254 426
Regina v. Simmonds, Hil. 10 Anne 374
Rex v. Charleston, 2 Stra. 871 .. 374
Rex v. Nixon, 1 Stra. 185 374
Rex v. Wilkes, 4 Burr. 2569 378
Reynolds v. Sweetser, 15 Gray 78 96
Reynolds v. Conway, 61 Vt. 313 . 253
Richards v. Todd, 127 Mass. 167 . 139
Richmond v. Aikin et al., 25 Vt. 324 525
Richards v. Delbridge, L. R. 18 Eq. 11 576
Rider v. Alexander, 1 D. Chip. 267 411
Riley v. Hart, L. & A. Ins. Co., 25 Fed. Rep. 315 82
Riley v. McInlear's Estate, 61 Vt. 254 426
Rixford v. Miller et al., 49 Vt. 319 516
Rix v. Nevins, 26 Vt. 384 520
Robinson v. Gould, 11 Cush. 55 .. 391
Robinson v. Johnson, 36 Vt. 69 .. 464
Rogers v. Murray, 3 Paige 390 .. 334
Rogers v. Highland, 69 Iowa 504 . 503
Rooney v. Minor, 56 Vt. 527 320
Rooney v. Soule, 45 Vt. 303 646
Ross v. White, 60 Vt. 558 578
Rowan v. State Bank et al., 45 Vt. 195 139
Rowell v. Fuller, 59 Vt. 688 384
Rowell v. Vershire, 62 Vt. 405 ... 641
Royce v. Maloney, 58 Vt. 437 ... 446
Rutland v. Paige, 24 Vt. 181 142
Byegate v. Wardsboro, 30 Vt. 746 200

Sampson v. Warner, 48 Vt. 247 . 259
Sawyer v. Phaley, 33 Vt. 69 384
Sawyer et al. v. Vilas, 19 Vt. 43 . 303
Sargent v. Baldwin, 60 Vt. 17 ... 578
Sargent v. Sargent, 18 Vt. 371 .. 578
Scarth v. Security M. L. Soc., 75 Iowa 346 82
School Dist. in Waterbury v. Harvey, 56 Vt. 556 530
Schmidt v. Barker, 17 La. Ann. 261 588
Scott v. Shepard, 3 Vt. 104 431
Scott v. Stamfield, L. R. 3 Ex. 220 208
Scudder v. Trenton, Delaware Falls Co., et al., 23 Am. Dec. 576 644
Seefield v. Chicago, etc., Rd. Co., 70 Wis. 216 117
Selleck v. French, 1 Conn. 32 ... 156
Sellers v. Till, 4 B. & C. 655 476
Seymour v. Darrow, 31 Vt. 122 .. 370

Shay v. Thompson, 29 Wis. 540.. 217
Sharon v. Strafford, 56 Vt. 421.. 543
Shattuck v. Shattuck, 5 Pick. 191 562
Shaw v. Beebe et al. 35 Vt. 205.. 500
Shepley v. Ritter. 7 Md. 408..... 644
Sherwin v. Bugbee, 17 Vt. 337.. 548
Slason v. Wright, 14 Vt. 208.... 142
Small v. Small. 4 Greenl. 220.... 265
Smith v. Potter, 27 Vt. 304..... 314
Smith v. Carey, 3 Camp. 461.... 476
Smith v. Rock, 59 Vt. 232..... 563
Smith v. Church, 27 Vt. 168.... 567
Smith v. Wilbur, 35 Vt. 132.... 568
Smith v. Rock, 59 Vt. 232..... 644
Solomon v. Manhattan Rd. Co., 103 N. Y. 437.. 115
Soper v. Frank, 47 Vt. 368..... 500
Soules & Sherman v. Burton, 36 Vt. 652 521
Spaulding v. Warner, 57 Vt. 654 253
State v. Mathews, 42 Vt. 542.... 26
State v. S. S., 1 Tyler 180..... 26
State v. Benedict, 11 Vt. 236.... 26
State v. Riggs et al., 22 Vt. 321.. 26
State v. Buffington, 20 Kan. 599.. 103
State v. Hayden, 51 Vt. 296..... 244
State v. Nulty, 5 Vt. 543..... 253
State v. Hopkins, 50 Vt. 330.... 253
State v. Hayden, 51 Vt. 296.... 256
State v. Kibling, 63 Vt. 636..... 259
State v. Hopkins, 56 Vt. 250 376, 264
State v. Hayden, 51 Vt. 296..... 272
State v. Meader, 54 Vt. 126..... 274
State v. Hardigan, 57 Vt. 100... 377
State v. Roe, 12 Vt. 111..... 384
State v. Carrier, 49 Me. 588..... 385
State v. Creight, 1 Brevard 169.. 385
State v. John, 8 Iredell's Law 330 385
State v. Howard, 32 Vt. 380.... 439
State v. Hill..... 459
State v. Ward, 61 Vt. 153..... 470
State v. Meyer, 58 Vt. 457..... 472
State v. Blair et al., 53 Vt. 24... 515
State v. Austin, 52 Vt. 291..... 569
State v. White, 64 Vt. 372..... 576
State v. Roe, 12 Vt. 93..... 609
Statham v. Hall, 1 Tur. & Rus. 30 87
Stackpole v. Robbins, 48 N. Y. 665 312
Stannard v. Burns, 63 Vt. 244... 322
Stacy v. Bostwick, 48 Vt. .. 192, 464
Steward v. Tutner, 3 Edw. Ch. 458 139
Stevens v. Joyal, 48 Vt. 291.... 242
Steere v. Steere, 5 Johns. Ch. 1.. 334
Stevens v. Talcot, 11 Vt. 25..... 384
Stennel v. Hogg, 1 Saund. Rep. 228 386
Stevens v. Pearson, 5 Vt. 503... 431
Steen v. Wardsworth, 17 Vt. 297.. 464
Stearns v. Stearns' Admr., 32 Vt. 678 500
Stone v. Hackett, 12 Gray 227... 576
Stott v. Rutherford, 92 U. S. 107 464
Stout v. Wren, 1 Hawks 420.... 216
Stowe v. Bishop, 58 Vt. 498 320, 470
Streeter v. West U. M. L. A. Soc., 65 Mich. 199..... 82
Strafford v. Sharon, 61 Vt. 126.. 32
Strong v. Riker, 16 Vt. 554..... 396
St. Johnsbury v. Thompson, 59 Vt. 300..... 230
Sullivan v. Jones, 2 Gray 570... 211
Sutton v. Bishop, 4 Burr. 2284, 2287.. 385
Sweet v. Sherman, 21 Vt. 23.... 609
Swift v. Dean, 11 Vt. 323..... 464

Talliaferro's Exrs. v. King's Admr., 9 Dana 331..... 153
Tatum v. Kelley, 25 Ark. 209... 588
Tayloe et al. v. Bond et al., Bushee's Eq. 5..... 171
Taylor v. Doremus, 16 N. J. Law 473..... 208, 211
Taylor v Kelley, 31 Ala. 59..... 266
Taylor v. Henry, 48 Md. 550.... 576
Tenney v. Harvey, 63 Vt. 520... 252
Tenney v. Harvey, 63 Vt. 520... 271
The King v. The West Riding of York, 7 East 588..... 483
The King v. Harris, 1 Salk. 47.. 374
The King v. Goffe, 1 Lev. 189... 375
The Queen v. Norton, Fortes 232 375
Thompson v. Warner, 62 Vt. 186 432
Thompson v. Hervey, 4 Burr. 2177..... 93
Thornton's Exrs. v. Thornton's Heirs, 39 Vt. 122..... 266
Thrall v. Chittenden, 31 Vt. 186.. 139
Tilden v. Minor, 45 Vt. 196..... 535
Tobias v. Francis, 8 Vt. 425..... 503
Todd v. Old Colony, etc., Rd. Co., 3 Allen 18..... 316
Tolland v. Willington, 26 Conn. 578..... 484
Tomkins v. Sands, 8 Wend. 462.. 211
Toulmin v. Reid, 14 Beav. 499.. 87
Topsham v. Chelsea, 60 Vt. 219.. 641
Treat v. Boston & Lowell Rd. Corp., 131 Mass. 371..... 120
Travelers' Ins. Co. v. McConkey, 127 U. S. 661..... 228
Treadwell v. Cordis, 5 Gray 341.. 171
Trost v. Dingler, 18 Penn. St. 259..... 265
Tucker v. Baldwin, 13 Conn. 136.. 259

Tunbridge v. Chelsea & Royalton, 58 Vt. 212 ... 32
Tupper and Potter v. Rider and Wife, 61 Vt. 69 ... 500
Tuttle v. Reynolds, 1 Vt. 80 ... 464
Tuttle v. Holland, 43 Vt. 542 ... 534
Tylor v. Alford, 38 Me. 530 ... 211

Urann v. Coates, 109 Mass. 581 ... 576

Van Dolsen v. Abendroth, 43 N. Y. 470 ... 159
Vanderburg v. Clark, 22 Vt. 185 ... 366
Vaughn v. Congdon, 56 Vt. 111 ... 208
Vinton v. Schwab, 32 Vt. 612 ... 114
Vincent v. Stinehour, 7 Vt. 62 ... 384

Walker v. Sargent, 11 Vt, 329 ... 385
Wardsboro v. Jamaica, 59 Vt. 514 ... 32
Warr v. Huntley, 1 Salk. 118 ... 93
Warner v. Quinlon, 50 Vt. 652 ... 140
Warner v. Caryl, 61 Vt. 331 ... 178
Washburn v. Ramsbell, 17 Vt. 299 ... 578
Watkins v. Hall, L. R. 3 Q. B. 396 ... 477
Waterman v. Conn. & Pass. R. Rd. Co., 30 Vt. 614 ... 410
Waterman v. Buck, 58 Vt. 519 ... 140
Webb v. Fulchire, 3 Ired. 485 ... 578
Weeks v. Lyndon, 54 Vt. 638 ... 248
Weeks v. Lyndon, 54 Vt. 638 ... 20
Wells v. Tucker, 57 Vt. 223 ... 311
Wells v. Steam Nav. Co., 2 N. Y. 204 ... 555
Werle v. Long Island Rd. Co., 98 N. Y. 650 ... 118
West Point Iron Co. v. Reyment et al., 45 N. Y. 703 ... 644
Westford v. Essex, 31 Vt. 461 ... 270
Westcott v. Central Vt. Rd. Co., 61 Vt. 440 ... 655
Westmore v. Sheffield, 56 Vt. 239 264
West River Bridge Co. v. Dix. 16 Vt. 446 ... 543
Wetherbee v. Wetherbee, 38 Vt. 460 ... 271
Wheeler v. Wheeler's Fstate, 47 Vt. 637, 645 ... 579
Wheeler v. Willard, 44 Vt. 640 ... 500
Wheeler v. Whelock, 33 Vt. 144 ... 284
Wheelock v. Moulton, 13 Vt. 430 259
Whittaker v. Field, 56 Vt. 426 ... 336
Whitcomb v. Denio, 52 Vt. 382 ... 114
Whitcher, Admr. v. Morey, 39 Vt. 459 ... 293
Whitcomb v. Davenport's Estate, 63 Vt. 655 ... 430
White v. White, 21 Vt. 250 ... 432
Whitney v. French et al., 25 Vt. 663 ... 526
Whitney v. Richardson, 31 Vt. 300 ... 527
White et al. v. White Exr., 21 Vt. 250 ... 560
White Mt. Rd. Co. v. Eastman, 34 N. H. 142 ... 587
Wiggin v. Scammon, 27 N. H. 360 ... 553
Willis v. Long Island Rd. Co., 34 N. Y. 670 ... 118
Wilder v. Wheeldon, 56 Vt. 344 ... 230
Willard v. Goodrich, 31 Vt. 597 ... 312
Wilcox v. Moon, 61 Vt. 484 ... 452
Williams v. Scott, 1 C. & M. 675, 678 ... 476
Wing, Admr. v. Hall et al., 44 Vt. 118 ... 646
Winooski v. Gokey, 49 Vt. 285 ... 460
Winn v. Rutland, 52 Vt. 481 ... 20
Wires v. Nelson, 26 Vt. 13 ... 464
Woodward v. James, 3 Strob. L. 552 ... 266
Woodward v. Gates, 9 Vt. 358 ... 503
Woolnoth v. Meadows, 5 East 470 ... 476
Worcester v. East Montpelier, 61 Vt. 139 ... 639
Wray v. Steele, 2 Ves. & B. 385 ... 335
Wright v. Hazen, 24 Vt. 143 ... 411

Yale v. Seely, 15 Vt. 221 ... 384
Yale v. Saunders, 16 Vt. 247 ... 290
Yates v. Lansing, 9 Johns. 395 ... 207
Yates v. Tisdale, 3 Edw. Ch. 71 ... 87
Young v. Young, 80 N. Y. 422 ... 576

Zemp v. Wilmington & Manchester Rd. Co., 9 Rich. Law 84 ... 120

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT.

General Term, 1891.

PRESENT: ROSS, Ch. J., TAFT, ROWELL, TYLER, MUNSON, START, AND THOMPSON, JJ.

WILLIAM C. CROFT *v.* BENNINGTON & RUTLAND RY. CO.

Railroad Company. Special charter modified by general law. Condemnation of land. Notice to land owner. Title by occupation. Equity.

1. The special charter of a railroad company was made subject to general legislation. At the same session a general law was enacted which modified the provisions of the special charter as to the condemnation of lands, but which did not go into effect until after the special charter. *Held*, that until the general law took effect the company should act under its charter in condemnation proceedings.

2. Where the charter required that commissioners appointed for the appraisal of land damages should give the land owner fifteen days notice, and their report shows that they in fact only gave three and that the land owner did not appear, the proceedings are void upon their face.

3. If the company subsequently enters upon the land, and constructs and fences its road upon a parol agreement with the owner that for the sum awarded by the commissioners it shall have the right of way as fenced, and shall leave the owner the use of a spring of water near the track, it will not acquire by occupation title to any land except that between its fences as then located.

4. Equity will enjoin the successors by mortgage to the original company from setting out the fences to the surveyed limits and thereby taking the owner's land and interfering with his use of the spring.

This was a bill in chancery brought to restrain the defendant from moving its fences along the line of its track where the same crossed the premises of the orator. Heard at the September term, 1890, Rutland county, upon bill, answer and stipulation. Taft, Chancellor, dismissed the orators' bill *pro forma*. The orator appeals.

From the pleadings and stipulation the following facts appear:

November 5, 1845, the legislature chartered the Western Vermont Railroad Co. The charter provided that unless the road should be completed within five years it should become void. It further provided that if the land-owners and company could not agree as to the value of lands taken, the damages should be determined by three commissioners to be appointed by judges of the county court for the county in which the lands were situated, who should give the land-owners and the company fifteen days notice of the time and place of hearing.

The road was not completed within five years, but by an act approved November 6, 1849, the original charter was amended by providing that the road might be begun within three years and completed within five. This amendment also made the entire act subject to the general law then in force, or afterwards enacted for the regulation and government of railroad corporations.

At the same session a general law was passed in reference to the assessment of land damages, by which it was enacted that in case the parties could not agree, the damages were to be determined by a commission of three to be appointed by the judges of the supreme court. This act did not take effect until December 1, 1850.

In the fall of 1849, the Western Vermont Railroad Co. surveyed and located its road through the lands of the orator, which

were then owned and occupied by one Ross, and not being able to agree with the owner as to the amount of his damage, application was made at the April term, 1850, to the judges of the county court for the County of Rutland, within which the land was situated, and three commissioners were appointed by them to appraise the damages. These commissioners made their report which was recorded in the town clerk's office, for the town of Clarendon in which the land lay. In this report the commissioners recited, that they gave the company and the said Ross, three days notice of the time and place when they would hear them, and that the said Ross did not appear.

The following summer an agreement was made between Ross and the company, that the company should construct its road upon the survey through his land, making a fill about four feet high, and should construct its fences along the foot of the embankment thus made, and that for the land so taken he should be allowed the sum which the commissioners had awarded him by way of damages. It was further agreed that the company should conduct a certain spring which there was close to the embankment, along the side of the embankment, and thence underneath its track, and that the fence should be so constructed that the spring would be accessible from the field of said Ross. This agreement was by parol.

Under this arrangement the railroad company did construct its railroad, and did build its fences along the foot of the embankment, and did suffer the spring to run along beside its embankment to the point specified and there conduct it underneath its track.

The Western Vermont Railroad Co. mortgaged its property and franchises to trustees to secure certain bonds; this mortgage was afterwards foreclosed, and the bondholders organized themselves into the Bennington & Rutland Railroad Co., the defendant in this suit. Both the Western Vermont Railroad Co. and the defendant continued to maintain and use its railroad and

fences as originally constructed, until just before the bringing of this bill, when the defendant began moving back the fences from the dump where the same crossed the orator's premises onto the line of the original survey in such a manner as to occupy more of the land than had been formerly occupied, and to cut off the orator from access to the spring previously mentioned. Thereupon the orators, who had acquired the premises by purchase and conveyance from Ross, brought this suit asking that the defendant be enjoined from so moving its fences.

J. C. Baker for the orator.

A railroad company in the condemnation of land must keep strictly within the conditions of the statute or the proceedings will be void. *Derby* v. *Railroad*, 119 Mass. 516; *Wilson* v. *Lynn*, 119 Mass. 174.

The report of the commissioners does not show that the parties had failed to agree as to the value of the lands deeded. Hence they had no jurisdiction. 7 Law. Rights, Rem. & Pr. s. 3895; *Reed* v. *Railroad*, 126 Ill. 48.

They did not give the required notice, and their proceedings are therefore void. 2 Beach Rail. s. 834.

The charter of the Western Vermont Railroad Co. as amended was subject to the general law. The general law provided a different way for the appraisal of land damages. Therefore, the whole proceeding actually had in this case was of no validity. *Grant* v. *Grant*, 32 Am. Rep. 506; *Bangor* v. *Goding*, 35 Me. 73; *Snell* v. *Campbell*, 24 Fed. Rep. 880; 7 Law. Rights, Rem. & Pr. s. 3780; *Railroad Co.* v. *St. Johnsbury*, 59 Vt. 320.

The successors of the Western Vermont Railroad Co. stand no better than that company itself. The fences a crossthe orator's premises were constructed and were notice to everybody of just what that company was occupying. *McAuley* v. *Railroad*, 33 Vt. 311.

Henry A. Harman, for the defendant.

The Western Vermont Railroad Co. properly proceeded in accordance with its special charter in the condemnation of lands, until the general law took effect. *Danforth* v. *Smith*, 23 Vt. 247.

The report of the commissioners showed that they heard the parties. This implies that Ross must have been present at the hearing. If present his appearance would waive any defect in the notice. *Hammond* v. *Wilder*, 25 Vt. 342.

The company duly recorded the report of the commissioners and deposited the amount of money awarded by them, in compliance with the statute. It thereby became seized of a strip of the width of the original survey, and no subsequent parol agreement could alter the boundaries of the lands which were thus acquired. At most, such an agreement would simply be a parol license which would be terminated by the death of the licensee or the alienation of the property. *Bartlett* v. *Prescott*, 41 N. H. 493; *Houston* v. *Laffee*, 46 N. H. 505; *Hill* v. *Hill*, 113 Mass. 103; *Mumford* v. *Whitney*, 15 Wend. 380; *Root* v. *Railroad Co.*, 23 Conn. 214; *Cobb* v. *Fisher*, 121 Mass. 169.

Neither the orators nor their grantor did any such act upon the premises as would render the license irrevocable. *Canfield* v. *Hard*, 58 Vt. 217; Story Esq. Jr., s. 763; *Meach* v. *Perry* 1 D. Chip. 182.

By recording its survey the company acquired a right to appropriate this land for the purposes of its railroad within the limits defined by that survey; and when Ross accepted the amount awarded by the commissioners he waived any antecedent irregularity in their proceedings. *Hitchcock* v. *R. R. Co.*, 25 Conn. 516; *Troy & Boston R. R. Co.* v. *Potter*, 42 Vt. 265.

The opinion of the court was delivered by

ROSS, Ch. J. The company organized under the charter granted to the Western Vermont Railroad Company, November 5, 1845, by the terms of the charter was to be dissolved and be-

come void, unless within five years from the passage of the act, the company built and put in operation ten miles of its road. This the company did not do; but within the five years, November 6, 1849, the legislature passed an act amending and extending the charter granted by the act of November 5, 1845. The act extending the original charter, gave the company three years from the passage of the extending act to commence the construction of its road and five years in which to complete it. The act granting the charter never became void by its terms. Before the time arrived for that to take effect, the legislature gave the company farther time, in which to build its road. From the passage of the extending act the original act was to be read, as though the provisions of the extending act were incorporated into it. The original act did not become void, but enlarged and modified by the extending act. By the extending act the charter was made subject to all general laws, then in force, or thereafter passed. On November 13, 1849, the legislature passed a general law relating to railroad corporations, which was not to become operative until December 1, 1850. The charter of the Western Vermont Railroad Company did not become subject to this law until that date. Both the charter and this general law had provisions, somewhat variant from each other, relative to the appointment and proceedings of commissioners, appointed to appraise the damages of the land owners whose lands should be taken for the purposes of the railroad. The company could proceed according to the provisions of its charter, in taking and appraising lands necessary to be taken for its road, until the general law became operative. It cannot be that the legislature, while requiring the company to complete its road in five years, or lose that right, intended, by making it subject to any general law, to leave it without any provisions for taking the necessary land of owners with whom they could not agree. Hence, before December 1, 1850, when the general law on this subject became operative, the company might procure the appointment of commissioners, by the judges of the county court,

and the commissioners so appointed might proceed in appraising the damages sustained by the land owners agreeably to the original charter. The bill alleges that the commissioners who undertook to act in the appraisal of the land taken from Walter Ross, were appointed by the county court within and for the county of Rutland, but the answer states they were appointed by the judges of the county court for that county. By the stipulation this allegation of the answer is to be taken to be true for the purposes of this trial. Hence the commissioners who undertook to act in the matter of taking and appraising the lands of Walter Ross were properly appointed and had authority to act, at the time they undertook to act in November, 1850, in defining and appraising the lands necessary to be taken from the lands owned by Walter Ross. But being a tribunal of special and limited jurisdiction, and their proceedings relating to the exercise of the right of eminent domain, in taking the property of Walter Ross without his consent, it was necessary that they should proceed in the exercise of their power, strictly in accordance with the provisions of the charter. Without so proceeding they would not obtain and retain jurisdiction to condemn his land. The charter required that they should give him fifteen days notice of the time and place of making the appraisement. The giving of this notice was requisite to obtain jurisdiction over him,—he being a resident of the State,—so that they could render a judgment which would bind him personally. In the award which was recorded, the commissioners say that they gave Walter Ross only three days notice and that he did not appear. After stating that he did not appear, the commissioners say, "And having viewed said premises and heard said parties in the matter, &c." It is contended by the defendant that by this it is to be understood that Walter Ross did appear and was heard on the subject of appraisement. If he did appear and was heard on the subject of the appraisment, he would waive the want of requisite notice and submit to the jurisdiction of the commission-

ers in the matter. The notice was required to be given that he might have an opportunity to be heard. Hence, if he actually appeared and was heard the ends to be attained by requiring fifteen days notice would have been attained. But we think the fair construction of the language of the award, "the said Walter Ross did not appear, and having viewed the premises and heard said parties in the matter" is that he did not appear and was not heard by the commissioners in the matter of the appraisement, and the words "said parties" mean the parties who did appear for the railroad company. Walter Ross not having had the required notice, and not having appeared, the proceedings of the commissioners were without legal force to bind him. The record of the award carried on its face notice to the company and to all who took any interest in the road from the company that the proceedings of the commissioners were without legal force from the failure of the commissioners to give the required notice and to acquire jurisdiction to proceed with the appraisement. But the defendant contends that by taking possession of the lands of Walter Ross, by constructing their road thereon, and by having recorded their locating survey and this award their possession extended constructively to the limits of the survey. By the seventh section of the charter, the company did not obtain title or seizin of lands attempted to be condemned by recording the survey. That was but one of the required steps. It must also have it legally appraised, and the money to pay the appraised damages, must be paid or deposited agreeably to the act. When all this was done agreeably to the charter, it is declared, "then said corporation shall be deemed seized and possessed of such lands so appraised by said commissioners." Hence the defendants' and their successors' possession did not extend beyond such lands of Walter Ross as it actually occupied, and by his possession of that portion of the land covered by the locating survey and award of the commissioners, occupied by Walter Ross, he occupied in his own right. When therefore the defendant en-

tered, subsequently to making the award, into an agreement with the defendant that he should receive the sum awarded for the land actually fenced and occupied by the defendant for the purposes of its railroad, the parties stood upon that agreement alone, and the possession of each was notice to all of their respective rights. Their respective possessions indicated to all the world their respective rights against each other. Neither party could convey any greater rights than his possession indicated.

The pro forma decree is reversed and cause remanded with a mandate to enter a decree for the orators in accordance with the prayer of the bill.

WILLIAM D. AMES *v.* DORSET MARBLE CO. & D. S. KENT & CO.

Former adjudication. Mill-owners. Not jointly liable for deposits. Watercourse.

1. The orator brought suit to restrain the defendant from obstructing a watercourse whereby the water was set back upon his meadow, and alleged that in a former suit at law the same question had been determined in his favor. It was found that this suit and the suit at law were for substantially the same cause of action. *Held*, that this finding was conclusive of the right of the orator against the defendant.
2. A land owner may change or modify the flow of a stream across his own lands, but not in such a way as to injure other lands upon the same stream.
3. Where the deposits from two mills situated one above the other upon a stream together cause injury to adjacent lands, their owners are not liable as joint tort feasors, but each is severally responsible for the proportion of the damages caused by his mill.

Bill in chancery to enjoin the defendants from obstructing a watercourse. Heard upon the pleadings and a masters' report at the June term, 1890, Bennington county. Royce, Chancellor, decreed for the orator.

The defendants appeal.

The orator is the owner of a farm upon the Battenkill river. The defendant Kent & Co. is the proprietor of a marble mill situated on this stream just below the orator's farm, and the defendant Dorset Marble Co. is the proprietor of another marble mill situated immediately below that of Kent & Co. A small mountain stream joins the Battenkill on the premises of Kent & Co.

William D. Ames *v.* Dorset Marble Co. & D. S. Kent & Co.

The masters found that the Dorset Marble Co. had constructed walls along the channel of the Battenkill which obstructed its flow to some extent in times of high water; that Kent & Co. had constructed walls along the Battenkill which to some extent interfered with its flow, and had diverted the mountain stream in such a way as to cause it to carry a larger quantity of gravel into the Battenkill than it formerly had; that both the defendants allowed the sand and worn marble from their mills to run into the Battenkill, and that the united result of all these causes was an obstruction of the stream to such an extent as to cause the water to set back onto the lands of the orator to their damage.

The amount of the damage was not found by the masters.

The remaining facts appear in the opinion.

Batchelder & Barber, for Kent & Co.

The defendants might erect walls upon their own lands in the prosecution of an important industry, notwithstanding that they thereby rendered it more difficult for the orator to keep the channel clear. While one may not injure he may occasion another inconvenience by the use of his property. *Canfield* v. *Andrew*, 54 Vt. I; *Snow* v. *Parsons*, 28 Vt. 459; *Jacobs* v. *Allard*, 42 Vt. 303.

The act of the Dorset Marble Co. is the proximate cause of the injury; for were it not for them the deposits of Kent & Co. would pass off without injury. Whar. Neg. s. 148; *Pottell* v. *Long*, 56 N. Y. 200; *Stevens* v. *Dudley*, 56 Vt. 157; Cool. Torts, p. 68 *et seq.*; *Marble* v. *Worcester*, 4 Gray. 395; *Scott* v. *Hunter*, 46 Penn. St. 192; *Cun* v. *Herring*, 11 Exch. 89; *Harrison* v. *Buckley*, 1 Strob, 525-529; *Proctor* v. *Jennings*, 6 Nev. 83; *Railroad Co.* v. *Reavey*, 42 Md. 136; *Fairbanks* v. *Alston*, 70 Penn. St. 86-91.

Certainly Kent & Co. are only responsible for the damages done by them. *Sillick* v. *Hall*, 47 Conn. 260; Gould Walters,

ss. 222, 386, 398, 565, 566; *Chepman* v. *Palmer*, 76 N. Y. 51; *Navigation Co.* v. *Richards*, 57 Penn. St. 142; *Wheeler* v. *Worcester*, 10 Allen 591; *Lull* v. *Fox Improvement Co.*, 19 Wis. 100; *Clark* v. *French*, 122 Mass. 419.

J. C. Baker, for the orator.

Injunction is a proper remedy. 1 High Inj., ss. 794-816; *Farris* v. *Dudley*, 78 Ala. 124; *Rothery* v. *Rubber Co.*, 90 N. Y. 30; *Mulry* v. *Norton*, 100 N. Y. 424.

The orator's right against Kent & Co. is *res judicata*. 1 Her. Est. and Res Adj., 233; *Porter* v. *Gile*, 47 Vt. 620; *Town* v. *Lamphere*, 34 Vt. 365; *Burton* v. *Barlow*, 55 Vt. 434; *Sturtevant* v. *Randall*, 53 Me. 149.

The opinion of the court was delivered by

ROSS, Ch. J. The Dorset Marble Co. has not appeared to prosecute its appeal. The decree of the court of chancery against it is substantially affirmed with costs. The right of the orator against D. S. Kent & Co. to have the bed of the stream of the Battenkill river through the premises of D. S. Kent & Co. unobstructed, and kept in such condition that it will not set the water of the river back upon the orator's meadow, is established by the judgment of this court in 1876. The masters have found that that "suit was for substantially the same cause of action as is alleged against said Kent & Co. in this suit."

This applies to the deposit of spent sand, worn marble, and gravel and sand from the mountain stream, in the bed of the river, so as to obstruct the flow of the water therein as established by the suit at law. The orator's meadow is higher up the river than the marble mills of the defendants. He has no interest in their use of the river on their respective premises, provided such use does not obstruct the flow of the water therein, so as to set it back upon his meadow to his damage. They have the right to use the water and its flow, as it passes across their respective prem-

ises, but not so to obstruct the passage of the water as to set it back upon the orator's meadow to its essential damage. D. S. Kent & Co. have the right to change the course of the mountain stream upon their premises, but are bound to make such change in such a manner as will not injure the orator. Under the same restrictions, the defendants have the right to wall the stream on their respective premises. It is found that the Dorset Marble Co. have obstructed the stream upon its premises, by narrowing and filling the channel, in various ways, and that D. S. Kent & Co. have contributed to the filling of the channel, by allowing its spent sand and worn marble to pass into the stream and by changing the course of the mountain stream so that it brings much more gravel and material into the bed of the Battenkill river. Each defendant is liable in damages in proportion only as its wrongful acts have contributed to obstructing the flow of the water, and to setting it back upon the orator's meadow. The defendants are not joint wrong doers, in the sense that they join in doing the same wrongful act, but only in the sense that their several wrongful acts combine in causing damage to the orator's meadow.

This does not make them joint *tort feasors*, in the sense that each is liable for all the damages occasioned to the orator's meadow. There must therefore be a further reference to the masters to ascertain the total amount of damages sustained by the orator, and the amount thereof which the wrongful acts of each defendant has contributed thereto.

It is found by the masters that the channel of the river, on the premises of D. S. Kent & Co. though walled is of sufficient capacity, if kept free from obstructions, to allow all the water of the river to pass off freely, but that the spent sand, and worn marble settle and obstruct the channel more or less. Doubtless the narrowing of the channel by the Dorset Marble Co. and the obstructions placed by that company therein, obstruct the passage, to some extent, of this material coming into the stream wrong-

fully from the mill of D. S. Kent & Co. The mountain stream brought a little gravel and sand into the river before its course was changed by Kent & Co. The orator used to clear this out of the channel, but the defendants have so walled the stream that it will, in the future, be difficult for the orator to remove it. Kent & Co. have so changed its course on the premises, that it brings much more sand and gravel into the river. If the defendants, to operate their marble mills successfully, must allow the spent sand and worn marble to pass into the stream to some extent, they must also carry the burden of keeping the channel of the stream at all times so cleared out, that it will work no damage to the orator.

The Dorset Marble Co. must make such change in the walls of the stream, and such removals otherwise, as will leave a channel of sufficient width, depth and capacity, to carry the water of the stream from the orator's meadow, as freely as it was wont to run before such walls and obstructions were placed in the channel of the stream. D. S. Kent & Co. must also either turn the mountain stream back to its former channel and open the walled partition of the channel of the Battenkill river so that the orator can remove whatever of deposit may be brought into it by the mountain stream; or it must, at its own expense, remove all such deposits brought into the Battenkill so that it will not occasion any setting back of its waters upon the meadow of the orator. The defendants as regards the orator have the right to utilize the Battenkill and the mountain stream, by walling or changing the channel, or by allowing spent sand and worn marble to pass into the water on their premises, provided, they do it in such a manner as will not cause the water to set back upon the orator's meadow to his damage.

The cause is remanded with a mandate in accordance with these views, and, as it is a substantial affirmance of the decree of the court of chancery, with costs to the orator in this court.

Munson, J., having been of counsel, did not sit.

JENKS L. WINCHELL *v.* NATIONAL EXPRESS CO.

Evidence. Principal and agent. Apparent authority. Charge of court.

1. The question being upon the value of a mastiff bitch used for breeding purposes, evidence is properly received as to the elements of value in such a dog and as to her pedigree.

2. Plaintiff sought to recover for injuries done his dog, while being transported by the defendant from the plaintiff's residence to its office in Fair Haven, whence it was to be forwarded by rail. Defendant denied that its agent had authority to receive expressage elsewhere than at its office. Thereupon the plaintiff claimed that the defendant had suffered the agent to hold himself out to the world in that capacity to such an extent that he might rely upon it; and introduced evidence tending to show that the agent used a wagon lettered with the defendant's name to the knowledge of the defendant in the collection of express parcels. *Held*, that it was not permissible to show that the agent used this wagon about his own business, unless such use was brought home to the plaintiff.

3. But the defendant might show that the agent had used the wagon in doing other than express work for the plaintiff himself.

4. Upon the question whether the agent had notified the plaintiff that dogs were sent at the owner's risk, it would have been proper to show that at the time of the pretended notification there was in the office at Fair Haven a book of instructions, one rule of which required such notice to be given, but since the time was not so limited the question was properly excluded.

5. A principal may become liable by permitting his agent to hold himself out as having apparent authority.

6. The court need not answer a request not warranted by the evidence, although it contains a correct proposition of law.

Case for injuries done the plaintiff's dog. Plea, the general issue. Trial by jury at the September term, 1890, Rutland

County, Taft, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff boxed his dog, which was a valuable mastiff bitch, for shipment by express to Long Island, and notified the defendant's agent at Fair Haven. Thereupon the defendant's agent sent the express wagon to the plaintiff's residence, where the dog was, to transport it from there to the express office. While on the way the dog was so injured as to render it unfit for breeding purposes. The defendant denied its liability, first, because the agent had no authority to receive the dog at the residence of the plaintiff, second, because the plaintiff had been notified that the dog if sent would be at the owner's risk, and had shipped it upon that condition. The questions raised by the exceptions appear in the opinion.

The plaintiff's second request was as follows:

"A person who had no duties relative to express matter, except to take packages from the railroad office to the consignees, and take similar parcels from consignees to the office of the company for transportation, has no authority to bind the company by an acceptance of goods, and until a delivery of the goods to an agent authorized to accept them, there is no responsibility attaching to them as common carriers."

J. C. Baker and Geo. E. Lawrence, for the defendant.

The delivery to the defendant's agent outside its office was not a delivery to the defendant. *Cronkrite* v. *Wells*, 32 N. Y. 247; *Blanchard* v. *Isaacs*, 3 Barb. 388; *Judson* v. *Railroad*, 4 Allen 520.

W. H. Preston, for the plaintiff.

Experts might testify as to the pedigree and value of this dog. Greenl. Ev. s. 480; *Bemis* v. *Railroad*, 58 Vt. 636; I Redf. R. R., 291.

Evidence that the defendant had suffered its agent to receive parcels away from the office as in this case, would justify the

plaintiff in believing that he had authority to do so. *Bank* v. *Express Co.*, 93 U. S. 184; Cool. Torts, 120; 1 Redf. R. R., 132: *Bank* v. *Champlain Transportation Co.*, 23 Vt. 186.

The opinion of the court was delivered by

ROSS, Ch. J. 1. The objections interposed by the defendant, to the testimony of the plaintiff, and of Coffin are unavailing unless exceptions were saved to the ruling of the court. The three questions and answers of these witnesses, to which exceptions were saved, were on subjects material to the proper estimation and determination of the value of the plaintiff's dog. The first related to the breeding and characteristics of her dam; the second to the elements constituting her value, and the third, to whether her sire and dam were valuable. They called for facts within the knowledge of these witnesses, which bore upon the value of the dog, which the plaintiff claimed was injured by the neglect of the defendant. There was no error in their admission. 1 Greenl. on Ev. (12th Ed.) ss. 440, 440a; 2 Best on Ev. (Wood's Ed.) s. 513. The breeding and pedigree of a dog used for breeding are elements to be considered in determining its value, as well as its personal characteristics.

2. The plaintiff sought to hold the defendant for an injury received while transporting the dog from the plaintiff's house, in Fair Haven, to the defendant's office, where it received and delivered matter carried by it, as an express company, partly on the ground that it had knowingly held out its agent, F. O. Vaughan, as having apparent authority,—whether he had such authority in fact or not,—to receive express matter at the plaintiff's residence, and at the residence of its other patrons in the village. It sought to establish this apparent authority in part by the use of the wagon,—in which the dog was being transported when injured,—in the business in collecting and delivering express packages,—which wagon had the name of the defendant printed upon its

sides,—and by the use of call-cards, in connection with such use of the wagon. The plaintiff claimed that such use being known to him, authorized him to believe that when he delivered this dog into this wagon, it was a delivery to the defendant, no matter whether in fact the defendant had given Vaughan authority to receive express packages for it at the residences of the patrons in the village. As bearing upon this issue, raised by the plaintiff, it was material for the defendant not only to show it did not own the wagon, and did not authorize its use in collecting or delivering express packages, but also to show that the whole use of the wagon and team, known to the plaintiff, was such that the plaintiff in the exercise of reasonable prudence was not authorized in believing that the receipt of the dog by Vaughan or his servant, into this wagon, was a receipt by the defendant. The three questions asked to Vaughan, and exclnded by the court, as well as the question put to Morehouse and excluded, called for information in regard to the use of the wagon by Vaughan, in other than express business. The first two questions to Vaughan and the one to Morehouse called for a statement of the use of the wagon, inconsistent with the defendant's entire control of it. The plaintiff could be affected by such use, only so far as it was either actually known to him, or was so public and open in his immediate vicinity that he would be presumed to have known of it. The defendant did not offer in connection with these questions to bring such use to the knowledge of the plaintiff. Hence these questions were properly excluded. The third question to Vaughan called for the use of the wagon, not in the express business, in the service of the plaintiff, and known to him. The exclusion of this question by the court on the ground that it was immaterial was a holding that no inquiry on that subject matter would be allowed, and, under our practice, was error if the subject matter of the inquiry was material in the determination of any of the issues raised. It was material, upon the issue of apparent authority in Vaughan to receive the dog in the wagon at the risk of the de-

fendant at the plaintiff's residence, for the defendant to show that Vaughan, to the knowledge of the plaintiff used the wagon and team as his own, in other business than collecting and delivering express packages; and that his entire use of the team, known to the plaintiff, was such that it should have indicated to him, in the exercise of common observation and prudence, that Vaughan was using the wagon and team in collecting and delivering express packages, as his team, for his own convenience, and not as a part of the transportation provided by the defendant for such matter. We think it was error for the court on this issue to exclude inquiry into the entire use of the wagon and team by Vaughan, known to the plaintiff.

3. There was an issue between the testimony of the defendant and that of the plaintiff in regard to whether the defendant had notified the plaintiff that dogs, when sent by express, must be sent at the owner's risk, as required by rule 25 of instructions to agents. The inquiry to Van Wagoner, whether these instructions were in the Fair Haven office, if it had been limited to the time when the defendant's testimony tended to show the notice was given, would have been a proper inquiry. If the instructions were then in the office, it would be more probable that the agent gave the required notice. Sup. to Roberts' Digest 93, *placita* 2, 3, 4, 5. Proof that such notice was given to the plaintiff, if received without objection or protest, would be one step towards establishing that the plaintiff consented to send the dog agreeably to the notice, at his own, instead of defendant's risk. But it was immaterial whether these instructions were there at some other time. The inquiry was too general and properly excluded.

4. We do not think that the defendant was entitled to have the court comply with his second request to charge. This request ignores the question of the *apparent* authority of defendant's agent, Vaughan. It is well settled that the act of an agent binds a principal in all cases, not only where the agent is acting within

the scope of his usual employment, but also where he is held out, or permitted to hold himself out, to the public or other party as having competent authority, although in the particular instance in question he exceeds his authority or violates his instructions. *Putnam & Co.* v. *French & Moore*, 53 Vt. 402; Story on Agency (7th Ed.) s. 443. In *Griggs* v. *Selden*, 58 Vt. 561, the court say that "in such cases the question is, not what authority was intended to be given to the agent, but what authority was the third person dealing with him justified from the acts of the principal in *believing* was given him." The plaintiff's evidence tended to show that the defendant permitted Vaughan to hold himself out as its agent to receive express matter for shipment, anywhere in the village of Fair Haven that he was requested to take it, and that the plaintiff believed this part of the business was done by the defendant. The charge of the court on this branch of the case in view of the testimony was correct.

5. There was no error in the court's refusing to comply with the fourth and fifth requests to charge. There is nothing in the exceptions which shows that there was any evidence tending to prove that the injury to the dog in any way resulted from the manner in which he was boxed, nor does it appear that the plaintiff had anything to do in loading the dog into the wagon. It is well settled that although requests may contain correct statements of law, the court is not bound to answer them, if it does not appear they were warranted by the evidence. *Winn* v. *Rutland*, 52 Vt. 481; *Weeks* v. *Lyndon*, 54 Vt. 638. The charge on this point was certainly as favorable as defendant was entitled to have given.

This disposes of all of defendant's exceptions urged in this court.

Judgment reversed and cause remanded.

FRED SMITH *v.* BARRE R. R. CO.

Railroad companies. Fences. Animals lawfully in adjoining fields. Charge of court.

1. It is the statutory duty of a railroad company to fence its road as against any animals that are lawfully upon the lands through which it passes.
2. Where the land owner contracted to pasture the plaintiff's horse in an adjoining pasture, from which he suffered it to escape upon his meadow, the horse is lawfully in the meadow as regards the railroad company, and the plaintiff may recover if it passes therefrom onto the track and is injured through the insufficiency of defendant's fences.
3. *Held*, that the court below sufficiently instructed the jury that the injury to the plaintiff's horse must have been caused by the neglect of the defendant to properly fence its road.

Action on the case for injuring the plaintiff's horse. Plea, the general issue. Trial by jury at the September term, 1890, Washington county, Munson, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff hired the horse pastured by Bedell & Abbott, who owned the farm where it was injured. The horse was kept in a pasture, between which and the defendant's track there was a sufficient fence. It escaped from the pasture into an adjoining meadow belonging to the same farm through the fence separating the two lots, and from there passed on to defendant's track.

The defendant requested the court to charge as follows:

"That the undisputed evidence shows that the plaintiff's horse was to be kept in this pasture; therefore the horse could not be lawfully upon any other part of the farm. The whole evidence shows the horse did not escape over the defendant's fence, but the fence of Bedell & Abbott onto other lands where he had no legal right, the horse then had strayed unlawfully on

the right of way of the defendant and the plaintiff cannot recover."

The court refused to so charge, and upon this point instructed the jury as follows:

"The owners of the farm had a right to have the horse in either the pasture or the meadow, and as against the railroad company the horse would have been rightfully in the meadow after escaping from the pasture through the dividing fence between the two lots. So that the railroad company is liable for the injury resulting to the horse from getting upon the railroad track after escaping through the bars, unless the owners of the farm had in some way waived the building of a fence against the meadow."

The defendant excepted to the refusal of the court to charge as requested, and to so much of the charge as is above given.

S. C. Shurtleff, for the defendant.

The horse being improperly upon the meadow, the plaintiff cannot recover. *Holden* v. *Rutland & B. R. Co.*, 30 Vt. 297; *Saxton* v. *Bacon*, 31 Vt. 540.

W. A. & O. B. Boyce, for the plaintiff.

Bedell & Abbott were to pasture this horse and might lawfully keep it on any part of their farm. It was no more unlawfully in this meadow than as if it had been their own. *Jackson* v. *Rut. & Bur. R. Co.*, 25 Vt. 150, 161; *Morse* v. *Rut. & Bur. R. Co.*, 27 Vt. 49; *Bemis* v. *Conn. & Pass. R. R. Co.*, 42 Vt. 375.

The opinion of the court was delivered by

ROSS, Ch. J. The defendant contends that the plaintiff's horse, on the occasion when it was injured, was wrongfully upon the meadow. The plaintiff had arranged with the owners of the meadow to pasture the horse in a pasture belonging to them, which adjoined the meadow, upon the understanding that it should be kept in the pasture. If the land owners allowed the horse to escape

upon the meadow, the horse would be wrongfully there neither as against the rights of the defendant, nor of the land owners. The statute requiring a railroad to fence its road is for the protection of the land owners, through whose land it runs, in any lawful use which they may desire to make of their lands:—that is, a use lawful as between the land owner and the railroad company. Under the finding of the jury in regard to the right of the owners of the meadow to have the defendant fence its road, the owners of the meadow had the right to turn the horse upon the meadow. If they had that right as against the defendant, and allowed the horse to go upon the meadow, in violation of their agreement with the plaintiff, the horse would still be upon the meadow lawfully and rightfully so far as regards the land owners and the defendant. The horse would not be trespassing upon the meadow as to either the land owners or the defendant. It is with reference to the rights of the land owners, and the defendants, that the horse must be wrongfully upon the meadow. It was the duty of the defendant to fence its road, to protect all animals which were, as regards the owners of the meadow, rightfully thereon. Hence the defendant was not entitled to have his request complied with. The plaintiff's horse was rightfully upon the meadow, for it was there without any fault of the plaintiff, and either by the fault or consent of the owners of the meadow. If by their fault, it was rightfully there as to the owners. They could not complain, or maintain any action of tort, or otherwise, against the plaintiff because of his horse being upon their meadow, and the defendant was bound to fence its road through the meadow to protect from harm such animals as might be lawfully and rightfully upon it, with reference to the owners of the meadow.

II. The defendant further contends that there was error in that portion of the charge which related to the subject of its request, in that the court did not confine the plaintiff's recovery for an injury caused by the defendant's neglect to fence its rail-

road. But, we think, this portion of the charge is not justly subject to this objection. It is true the court did not in terms tell the jury that the injury to the horse must have been caused by the defendant's failure to perform the duty imposed by statute in regard to fencing its road. But in substance it did so instruct them. It said: "So that the railroad company is liable for the injury resulting to the horse from getting upon the railroad track," &c. Under this instruction the injury to be recovered for must have resulted to the horse from getting upon the railroad track. It was not claimed if rightfully upon the meadow that the horse came upon the railroad track through any fault or neglect, except the failure of the defendant to fence its road as required by law. This was a correct statement of the law that the injury must be caused by the failure of the defendant to discharge its statutory duty. It might well have been more full, and it may be well presumed that the charge if given entire would show that it was more full and explicit on this subject. The exceptions pretend to give only that portion of the charge which relates to the defendant's request. We find no error in the proceedings.

Judgment affirmed.

STATE *v.* GLENN COFFIN.

Breach of the peace. Firing guns and blowing horns in day time. R. L. ss. 4228 and 4234.

1. A complaint setting forth that the respondent "did disturb and break the public peace by tumultuous and offensive carriage, by firing guns, blowing horns, and beating tin pans," charges an offence under R. L. s. 4228.

2. Because these acts are punishable under R. L. s. 4234 when done in the night time, it does not follow that they may not under some circumstances amount to a breach of the peach in the day time.

Complaint of a town grand juror charging the respondent with a breach of the peace under R. L. s. 4228. Heard at the March term, 1891, Washington county, Munson, J., presiding, upon general demurrer to the complaint. Demurrer overruled, and respondent sentenced to pay a fine of two dollars and costs of prosecution. The respondent excepts.

John H. Senter, for the respondent.

The acts alleged in the complaint do not amount to a breach of the peace when done in the day time. It is only between sunset and sunrise that they are unlawful. R. L. ss. 4228, 4244.

Zed S. Stanton, States Attorney, for the State.

The complaint charges a breach of the peace in one of the modes pointed out by the statute and is sufficient. R. L. s. 4228; *State* v. *Benedict*, 11 Vt. 236; *State* v. *Mathews*, 32 Vt. 542.

The opinion of the court was delivered by

ROSS, Ch. J. The demurrer admits that the respondent, at the time and place named, "did disturb and break the public peace

by tumultuous and offensive carriage, by firing guns, blowing horns and beating tin pans and other unnecessary and offensive noise." The contention is whether the public peace can be disturbed and broken by the acts charged. The complaint is brought upon R. L. 4228, which provides for the punishment of a person who disturbs or breaks the public peace, "by tumultuous and offensive carriage, by threatening, quarrelling, challenging, assaulting, beating or striking another person." In *State* v. *Mathews*, 42 Vt. 542 it is held that in charging this offence, whether by tumultuous and offensive carriage, by threatening, or by any other of the specified ways, it is not enough to charge the offence in the language of the statute, by which it is there declared the offence may be committed; but the pleader must set forth the acts by which he claims the offence was committed. Here the pleader has alleged that the offence was committed by tumultuous and offensive carriage; and has specified as the acts constituting such carriage, the firing guns, blowing horns, beating tin pans, and other unnecessary and offensive noise. The respondent contends that these are lawful acts when done in the day time, and only punishable when done in the night time under R. L. 4234. Under that section, when done in the night time, it is provided they may be charged and punished as constituting a breach of the public peace. From the language of the section it appears, that when done in the night time, they are *prima facie* a breach of the peace. But we do not think that section, by implication, provides that the doing of these acts, under all conceivable circumstances, in the day time, are lawful, and may not constitute a breach of the public peace. In *State* v. *S. S.*, 1 Tyler 180, *State* v. *Benedict*, 11 Vt. 236 and *State* v. *Riggs et al.*, 22 Vt. 321, R. L. 4228 this court has had under consideration the offence legislated against, and has defined it to be one, "calculated to put one in fear of bodily harm, and disturbing that quiet and repose, which constitute essentially the comfort and rest of social life" or "that invisible sense of security, which every man feels

so necessary to his comfort, and for which all governments are instituted." The act must be one which will be likely to put a person of ordinary firmness in such a state of fear.

Firing guns, blowing horns, beating tin pans, and other unnecessary and offensive noise, may surely be so done in the day time by a reckless, frenzied or drunken man, in or about a private dwelling, or in an assembly of citizens or children, as will create in persons of the greatest firmness and coolness a just apprehension of bodily harm, and disturb the quiet and repose which constitute essentially the comfort and rest of social life. This being so we think the offence is well charged under R. L. 4228, in the language of the complaint, and that R. L. 4234 which declares such acts when done in the night time a breach of the public peace, does not prevent their constituting such a breach under R. L. 4228 when done so as to disturb the public peace as already defined, in the day time.

Judgment that there is no error in the proceedings of the county court, and that the respondent takes nothing by his exceptions, and that execution of the sentence of the county court be enforced.

TOWN OF UNDERHILL *v.* TOWNS OF ESSEX, JERICHO AND WILLISTON.

Maintenance of bridge not within the limits of a town. Vacation of previous assessment. No. 16 Acts of 1886. No. 18 Acts of 1884. Vested rights. Strafford v. Sharon, 16 Vt. 126, criticized.

1. Under No. 16 Acts of 1886, amending No. 18 Acts of 1884, which related to the maintenance of highways and bridges by towns benefited thereby, no town can be compelled to contribute to the expense of maintaining a highway or bridge not wholly or in part within its limits. The only effect of that act is to provide a method by which towns already assessed for such contribution can have that assessment vacated

2. No vested right was created by a judgment under the law as it formerly stood assessing a town for a portion of the expense of maintaining a highway or bridge not within its limits. *Strafford* v. *Sharon* 61 Vt. 126, so far as it rests upon this ground, criticized.

This was a petition by the town of Underhill asking to be relieved from a judgment assessing it for the support of a bridge between the towns of Williston and Essex. The case was referred to commissioners, and was heard upon their report at the September term, 1890, Chittenden county, Rowell, J., presiding. The court apportioned the expense of maintaining the bridge between the towns of Williston, Essex, and Jericho, and released the town of Underhill from further expense. To this judgment the town of Jericho excepted.

M. H. Alexander, and Seneca Haselton, for Jericho.

The town of Jericho cannot be made liable for any part of the expense of maintaining this bridge, since it is situated wholly

within the towns of Essex and Williston. *Tunbridge & Chelsea* v. *Royalton*, 58 Vt. 212; *Wardsboro* v. *Jamaica*, 59 Vt. 514; Act No. 18, Laws of 1884, s. 6; Act No. 16, Laws of 1886, s. 7.

No vested right was created by the former judgment in favor of Essex and Williston. A town is a municipal corporation, created for political purposes, and the legislature may make or repeal any law relating to them. Cooley Const. Lim., 6th Ed. pp. 228–9; Dillon Mun. Cor., 4th Ed., 54, 63 and notes; Endlich Interp. St., s. 284, p. 385; *Groff* v. *Mayor*, 44 Md. 67; *United States* v. *Railroad Co.*, 17 Wall, 322; *Barnes* v. *District of Columbia*, 1 Otto 540; *People* v. *Morris*, 13 Wend. 325; *Pye* v. *Peterson*, 45 Tex. 312; *Philadelphia* v. *Fox*, 64 Penn. St. 169; *Sloane* v. *State*, 8 Blackf. (Ind.) 361; *Clinton* v. *Cedar Rapids R. R. Co.*, 24 Iowa, 455; *Mayor, etc.* v. *Shener*, 37 Md. 180; *Yeathn et al.*, v. *U. S.*, 2 Pet. 256; *Rachel* v. *U. S.*, 2 Pet. 388; *Commonwealth* v. *Bird*, 12 Mass., 443; *Palmer* v. *Overseer*, 3 Wend. 193; *Bates* v. *Kimball*, 2 D. Chip. 79; *Pratt* v. *Jones*, 25 Vt. 303; *Huie* v. *Pomeroy*, 39 Vt. 211; *Wardsboro* v. *Jamaica*, 59 Vt. 514.

Every reasonable presumption should be made in favor of the constitutionality of this law. *Bennington* v. *Park*, 50 Vt. 178; *Drew* v. *Hilliker*, 56 Vt. 641; *In re Hackett*, 53 Vt. 357; 41 Mo. 63.

W. L. Burnap and M. A. Bingham for Williston and Essex.

Taking R. L. ss. 2960–2966, 2975–2978 as amended by No. 18 Acts 1884, and No. 16 of 1886, the town of Jericho may be assessed towards the support of this bridge, although the same is not situated within its limits.

Even if that is not so, a vested right was created by the original judgment which cannot be impared so long as the condition of things remains the same. *Stafford* v. *Sharon*, 61 Vt. 126.

The opinion of the court was delivered by

ROSS, Ch. J. By the judgment of the Chittenden County Court in 1859, the towns of Underhill and Jericho were assessed to assist the towns of Essex and Williston in the erection and maintenance of a bridge across the Winooski river between the towns last named, on the ground that the former towns would be benefited thereby. This is a petition brought by the town of Underhill in 1888, asking that the original cause be brought forward upon the docket of the court, and a new assessment or apportionment be made, and that Underhill might be released. On the report of commissioners appointed to hear and report the facts and make a new apportionment of the expense of maintaining the bridge, the court rendered judgment apportioning a part of such expense to the town of Jericho. To this judgment the town of Jericho excepted, claiming that the law had been so changed that it was no longer liable to contribute to such expense. This is the question presented for consideration.

Before the passage of No. 18 of the Acts of 1884, towns benefited by the building and maintaining of a highway or bridge located in other towns, when the town or towns in which they were located would be excessively burdened by building and maintaining them unaided, could be assessed therefor. R. L. 2960 to 2966, 2975 to 2979, and No. 16 Acts of 1882. No. 18 of the Acts of 1884 provides in s. 1, "No town shall be assessed toward the expense of maintaining any highway or bridge in another town, or of building any such highway or bridge except as provided in sections 2958 and 2959 of Revised Laws and as hereinafter provided." The provisions of this act referred to were repealed by s. 7 of No. 16 of Acts of 1886 and need not be considered in full. It continues in force and extends the application of R. L. 2978 and 2979. R. L. 2978 relates to the building and maintaining of a bridge between two towns, and gives the court power to reapportion the expenses thereof every five years between the towns in which the bridge is located and

other towns benefited. R. L. 2979 gives towns required to build and maintain a bridge on or near the line of two or more towns by an act of the legislature, the right to have the expenses thereof reapportioned every five years. Section 7 of No. 18 of the Acts of 1884 repeals R. L. 2975 to 2977, which gave to the court power to relieve and assist a town excessively burdened by being required to build a bridge or highway wholly therein by assessing other towns benefited in the vicinity, and also repeals No. 16 of the Acts of 1882 relating to the same subject matter. It also repeals "all acts and parts of acts inconsistent herewith." The contention is whether that part of R. L. 2960 to 2966, which gives the court power to apportion a part of the expense of a bridge over a stream between two towns to other towns benefited, is repealed as inconsistent with the provisions of No. 18 of the Acts of 1884. The towns of Essex and Williston contend that these sections provide for an assessment of other towns benefited, and the sections 2975 to 2977, repealed in terms, relate to giving relief to towns excessively burdened by building and maintaining a bridge or highway wholly within such towns. But such relief is given by casting a part of the excessive burden upon other towns in the vicinity, especially benefited thereby. The assessment upon other towns under both of these provisions of the Statute is made upon the same general basis of benefit. The whole of ss. 2960 to 2966 could not be repealed without repealing necessary provisions for apportioning the expense of such bridge between the towns which it connects. Besides, No. 18 of the Acts of 1884 applies to a bridge across a stream between two towns inasmuch as it leaves s. 2978, which relates to that subject, in force, and makes it applicable not only to a bridge between two towns, but generally to highways and bridges wholly in one town. The provisions of R. L. 2960 to 2966, for the assessment of other towns benefited by a bridge across a stream between two towns are inconsistent with the provisions of No. 18 of the Acts

of 1884. This act starts with the declaration, "*No town* shall be assessed toward the expense of maintaining *any highway or bridge in another town*, or of building *any such highway or bridge*, except as provided in sections 2958 and 2959 of the Revised Laws, and as hereinafter provided." It then proceeds to make the provisions of the excepted sections of the Revised Laws, which originally were applicable only to a bridge between two towns or on or near the line of two or more towns, applicable to all highways and bridges. This clearly manifests an intention of the Legislature to place all bridges and highways, wherever located, upon a common basis, and to give the same relief to the towns primarily liable for their erection and maintenance against other towns benefited. Hence we think the inconsistent provisions of ss. 2960 to 2966, or those relating to assessing a portion of the expense on other towns benefited, were repealed by s. 7 of No. 18 of Acts of 1884. And when by section seven of No. 16 of the Acts of 1836, ss. 2, 3, 4, 5 & 8, and part of s. 6 of No. 18 of the Acts of 1884 were repealed, there was of the act of 1884 left only the provision of s. 6, which provides a method by which "any town assessed towards the expense of maintaining or repairing any bridge or highway in another town" might procure the vacation of the assessment. Under this construction of the law, which is in accord with *Tunbridge & Chelsea* v. *Royalton*, 58 Vt. 212, and *Wardsboro* v. *Jamaica*, 59 Vt. 514, it was error for the County Court to impose any portion of the burden of maintaining the bridge across the Winooski River between Essex and Williston upon the town of Jericho. After the passage of the law of 1886, relief to these towns in maintaining the bridge, if any, must be sought from the State, agreeably to the provisions of No. 16 of the Acts of 1886.

II. But the towns of Essex and Williston contend that under the decision of *Strafford* v. *Sharon*, 61 Vt. 126, they acquired by the judgment in 1859 a vested right to have the town of Jericho assist in maintaining the bridge so long as the latter con-

tinued to be benefited by its maintenance. The decision of *Strafford* v. *Sharon* was made by a divided court, and some members who did not join in the dissenting opinion, gave their assent upon the ground first developed in the opinion, which does not rest upon the doctrine of vested rights. If the doctrine of vested rights is applicable in such cases, a town once assessed can never be relieved so long as the conditions exist upon which the assessment was made. This is contrary to the action of the Legislature, and the tenor of the decisions of this court. Highways and bridges, their establishment and maintenance have ever been regarded as within legislative control. The right to have and enjoy them arises from public necessity. It does not exist in a town in its corporate capacity. So far as its inhabitants are a part of the public, they are interested in the exercise of the right, but no further. It is a right inherent in the State. In exercising this right, the right of eminent domain, which rests in the State, is invoked. The State might assume the entire burden attendant upon its exercise, but it has placed it on such municipalities as it has thought equitable, and varied it from time to time, to suit circumstances, or public policy. A petition to have a highway or bridge established or maintained, is a proceeding taken in behalf of the public to have determined, in the manner provided by statute, whether the public good requires the establishment of the proposed highway or bridge, and, if it is found that public good requires its establishment, to determine according to the statute, on what municipality or municipalities the burden shall fall. It is, in no sense, a suit in which one town has, as such, any corporate right, or interest, more than another. It is for the corporate interest of all the towns of the State, so far as regards the inhabitants of each, that all necessary highways and bridges shall be established and maintained. But the easement taken for their establishment, though taken at the expense of a particular town, does not create a property right

therein, in such town, further than possibly the right to the materials which it has provided and used in the construction of the highway or bridge. The proceeding, for the establishment of a highway, or for determining what towns shall bear the burden of its establishment, is not a suit which involves any corporate right or property of the towns, except indirectly in reference to how much the towns shall respectively contribute towards the public burden. The right to have these burdens borne, and to prescribe how they shall be borne rests in the State. The State through its legislature, may prescribe from time to time, the manner in which such burdens shall be borne, and change the manner, at its pleasure. The legislature has power to revoke charters of towns which it has granted, and set the territory, embraced therein, into other towns, yet if the doctrine of vested rights applies in a case in which the proportion which two or more towns shall contribute towards the maintenance of a highway or bridge has been determined, and that proportion is forever thereafter fixed, then by prescribing and having judicially determined the share which such town shall bear, the legislature not only loses the right to take away the charter of either town, but to change the method of bearing such public burden. It could not even relieve the towns interested from the entire burden; because the towns would have a vested interest therein. The statement of the reach of the contention is its refutation. So far as the decision of *Strafford* v. *Sharon* is placed on the doctrine of vested rights, we do not think it is grounded either in principle, or reason.

The judgment is reversed, and judgment rendered that under the law Jericho cannot be assessed and that the expense of maintaining the bridge be borne by Essex and Williston, in the proportions reported, and that Jericho recover its costs.

Taft, J., being a tax payer in Williston, did not sit.

HUBBELL LATHROP *v.* TOWN OF SUNDERLAND.

School district. Presumption as to organization of union district. Not dissolved by adoption of town system.

1. A school district, composed of territory from two or more towns, which has maintained an organization and acted as a school district since 1800, will stand, as to being dissolved, like a union district formed by the concurrent votes of two or more towns.

2. Such a district would not be, as the law was in 1886, dissolved by the adoption of the town system by that town in which the school house was located.

Assumpsit for the recovery of taxes paid under protest. Heard upon the report of a referee at the June term 1890, Bennington county, Royce, Ch. J., presiding. Judgment *pro forma* for the plaintiff. The defendant excepts.

The tax in question was a school tax assessed by the defendant town against the plaintiff. The plaintiff claimed that this tax was invalid for the reason that the district within which he resided had never been dissolved and that therefore the town had no right to tax him for the maintenance of schools. The defendant claimed that the district had been dissolved by the adoption of the town system by it.

In reference to the district, its organization and maintenance, the referee reported as follows:

"School District No. 1 in Sunderland, and the persons owning or residing upon certain farms in the town of Manchester, and one farm in the town of Sandgate, have all acted together and supported a school as one district since before the year 1800. The district officers during this time have been chosen in part from Manchester and Sandgate. The Manchester part of the district at one time was known as the Bronson district, but

never had any organization except with Sunderland, and never chose officers or had a school house or school by themselves. The farm in Sandgate is so situated in reference to the mountains and highways that it cannot practically be accommodated in any other school district."

There was no record produced before me of any action on the part of Sunderland, Manchester, and Sandgate, creating a union district, except as hereinafter stated. The first record evidence of an organization of this district was at a meeting called by the selectmen of Sunderland on the 6th day of November, A. D. 1805. At the first annual meeting of the district after its organization, holden November 25th, 1806, a resident of Manchester was chosen moderator, and other Manchester men participated in the meeting; and the officers of the district have been elected from year to year since that time without reference to whether they resided in the Manchester, Sunderland, or Sandgate part of the district. There has been a school house in the Sunderland part of the district for more than a hundred years.

At a school meeting held at the school house in District No. 1, in Sunderland, March 20, 1858, among other things it was voted to exclude all persons residing in Manchester and Sandgate from participating in the benefits of such district, and then voted to adjourn to the second Tuesday of September following.

March 29, 1858, a school meeting was warned to meet at the shop of one King in the Sunderland part of the district on the 5th of April, 1858, for the purpose, among other things, of voting to exclude certain persons residing in Manchester and Sandgate from the District.

For some time subsequent to the meeting held on the 5th day of April, 1858, a majority of the voters in the Sunderland part of the district held school meetings, elected officers and assessed taxes, and kept up a school. A suit growing out of the assessment and collection of the taxes last named was commenced between a tax payer by the name of Lyman Bowen against Lemnel King, the collector; the case was tried in the County Court

and passed to the Supreme Court on exceptions; was tried in the Supreme Court, and the case is reported in Volume 34, page 156 of the Vermont Reports. At the hearing before me a certified copy of the referee's report in that case and of the opinion of the court was offered in evidence by the plaintiff, and the same was objected to by the defendant, (counsel on both sides agreed that the printed case as reported in Volume 34, page 156 and the following pages might be used the same as the certified copies, provided such certified copies were admissible). The case was admitted and is made a part of this report. The facts in this case are found upon other evidence, but if the court is of the opinion that the record of said case is admissible, and it is competent for the referee to find any of the facts stated in that case upon that record, then the referee finds such further facts as said record contains in addition to the facts otherwise set forth in this report. The school district after the decision of the case of *Bowen* v. *King*, *supra*, seemed to accept that decision as final, and have maintained a school, elected officers and assessed and collected taxes each year up to the time the present controversy arose."

Batchelder & Barber, for the defendant.

When a town adopts the town system all districts are thereby dissolved, except graded school districts, and districts formed by the concurrent votes of adjoining towns.

School District No. 1 in Sunderland was neither.

The legislature has full authority over the municipal corporations which it has created. 1 Dillon Mun. Cor. 54 and cases cited; Cooley Const. Lim. 230; and cases cited; *Montpelier* v. *East Montpelier*, 27 Vt. 706; *Town of Bennington* v. *Park et al.*, 50 Vt. 178.

J. C. Baker, for the plaintiff.

Under the facts reported it will be presumed that this district was organized by a concurrent vote of the town, there having

been a statute under which that might have been done since 1808. *Barnes* v. *Barnes*, 6 Vt. 393; *Bull* v. *Griffith*, 30 Vt. 273; *Pierce* v. *Whitman*, 23 Vt. 626; *Bowen* v. *King*, 34 Vt. 156; *Brock* v. *Bruce*, 59 Vt. 313.

Since this district has not been abolished, the town system does not extend to it and no legal tax can be laid by the town for the support of schools. *Rowell* v. *Horton*, 57 Vt. 31; *Brock* v. *Bruce*, 58 Vt. 261.

The opinion of the court was delivered by

ROSS, Ch. J. In March, 1886, the town of Sunderland adopted the town system of schools. The plaintiff's right to recover depends upon whether, by the adoption of the town system, school district No. 1 in that town, in which the plaintiff resided, was dissolved. The character of that district was determined by this court in *Bowen* v. *King*, 34 Vt. 156. It is there held to be "a fixed and permanent union district," presumably under a special charter from the legislature, "indissoluble except in the mode pointed out by the statute," and that it could not be dissolved by the action of a part of the district, nor by the action of one town. The union district there spoken of, is not a union district under R. L. 573, but a district composed of territory from two or more towns organized under the law of 1808, R. L. 501, by the concurrent vote of the towns, or under a special act of the legislature. Until 1828 no general law was enacted for dissolving such school districts. It was then enacted that they might be dissolved by three justices of the peace appointed by a judge of the county court. Subsequently and before the passage of the act giving a town the right to adopt the town system, it had been provided, that before application could be made to such judge to appoint justices to dissolve such district the vote of the several towns in which the district was situated must be taken on the question of dissolving the district. If their votes concurred in favor of a dissolution the district was dissolved. If they were non concurrent the

application to such judge for the appointment of justices could be resorted to.

In *Pierce, Admr.*, v. *Whitman*, 23 Vt. 626, this court held that the provision of the law for the dissolution of districts of this character, enacted in 1828, applied to all such districts, however created, or when, as in that case, created by a special charter from the legislature. School district No. 1, in Sunderland, under these decisions, in 1886 was a district of that character, being composed of territory taken from the towns of Sunderland, Manchester, and Sandgate, created presumably under a special charter from the legislature, and dissolvable, as the law was in 1886, primarily by the concurrent vote of these towns, R. L. 546, 547, unless it could be dissolved by the sole vote of Sunderland, in adopting the town system. Hence the sole contention is in regard to the legal effect of its vote adopting the town system. Did it dissolve School District No. 1? It is evident from an inspection of the statute in regard to the adoption of the town system and its effect, that it was not the purpose of the legislature to give the town adopting that system power to dissolve a district for whose dissolution the concurrent vote of all the towns from which it was organized, was required. R. L. 589, reads: "A town may at its annual meeting abolish the school district system which the town by its sole action had created. But the restricting section of the act providing for the town system, contained in R L. 604 makes this purpose of the legislature more explicit. That reads: "The foregoing provisions of this chapter shall not apply to graded school districts which have been incorporated by an act of the legislature, unless accepted by a vote of two-thirds of the voters therein, nor to a district formed by the concurrent votes of two or more towns, without the concurrent votes of each of said towns consenting thereto." This section indicates that the purpose of the legislature was to limit the effect of the vote of the town adopting the town system, to such school districts as it had exclusive power to abolish. It ex-

cepted from the operation of such vote districts existing under a charter or special act of the legislature, and districts formed by the concurrent votes of two or more towns, which, at the time the act establishing the town system took effect, could be abolished by such concurrent vote. While district No. 1 in Sunderland, according to the decision of *Bowen* v. *King*, *supra*, presumably was established under a special act of the legislature, which might or might not have required the concurrent vote of the three towns from whose territory the district was taken, it is determined to be possessed of the identical characteristics of a district formed by the concurrent vote of the three towns, and capable of being dissolved by such concurrent vote. It falls, therefore, not exactly within the letter of the excepting section of the statute, but fully within its reason and purpose. We think, both from the opening section and the excepting section of the act establishing the town system, and from the reason and purpose of the law, that district No. 1 in Sunderland was not dissolved by the vote of Sunderland adopting the town system of schools. Hence the plaintiff remained a resident tax payer of that district, and not the subject of taxation by the town to support the town system. He is therefore entitled to recover the tax sued for.

Judgment affirmed.

Munson, J., having been of counsel did not sit. Taft, J., concurred in the result.

H. H. HARWOOD *v.* VILLAGE OF WEST RANDOLPH.

What damages are recoverable for the taking of water rights.

1. The petitioner was the owner of certain large springs, the water from which ran in well defined courses across his lands. The petitionee too these, improved them and used all the water in connection with its water system. *Held*, that the petitioner was entitled by way of damages not merely to the value of the water to him as it ran, but also to the value of the springs for the purpose of improvement and development.

2. But what the springs would have possibly been worth for the purpose of supplying the petitionee itself and its inhabitants with water, had it constructed no system of its own, is not a proper basis for estimating the damages, the owner having contemplated but never actually undertaken such an enterprise.

This was an appeal by the petitioner from an award of damages to him for the taking of certain water rights. Heard upon the report of commissioners and exceptions thereto at the June term, 1890, Tyler, J., presiding. Judgment for the smaller sum named in the report. The petitioner excepts.

The petitioner was the owner of several large springs the water from which ran in well defined courses across his land and on to and across the lands of other persons. The petitionee took these springs, made the necessary excavations and constructions, and conducted all the water obtained from them into its large distribution reservoir. Before taking the springs, the petitionee purchased the riparian rights of all persons interested in the waters after they left the premises of the petitioner, and it claimed upon the assessment of damages that the petitioner was only entitled to such sum as his right to the water, as it flowed in its natural condition across his land, was worth to the petitioner. If this was the correct basis for estimating the damages, the com-

missioners awarded him $200; but if the petitioner had an interest in the springs beyond this, for the purpose of development and sale, then they awarded him $300 damages.

The petitioner introduced evidence tending to show that these springs were of very great value as furnishing the most feasible supply of water for the village of West Randolph, petitionee. With regard to this claim the commissioners reported:

"The petitioner also claimed that he, being the owner in fee of the land where the water from these three springs issued from the ground, had a property in the water and had a right to dispose of the same; and had a right to apply to the legislature for a charter for the purpose of supplying the village of West Randolph with water, and that he could have disposed of his water rights taken by said village to said contemplated corporation for a much larger sum than we awarded him, and as a basis for the award of damages and as showing what the petitioner is entitled to receive, the petitioner introduced evidence of the cost of this system of water works to the village of West Randolph, which was about twenty-three thousand dollars, and also showed the annual income from the rentals of such water including the estimated value of the fire protection afforded by the various hydrants in different parts of the village. Upon this basis witnesses estimated the value of the water taken from the petitioner's land to be from three to five thousand dollars.

The petitioner in the year 1883, contemplated conveying water from these springs to the village of West Randolph, and had promise of aid to do so provided he could get one hundred persons to agree to take the water at ten dollars each. A paper was drawn up for that purpose, but a sufficient number of names were not obtained and nothing was further done about it.

The petitioner had never applied for any charter for the purposes claimed, and it was a matter of doubt in the minds of many as to the success of the enterprise until after the works were constructed; it is also a matter of conjecture whether the

village of West Randolph would have taken this water from a private corporation or not for fire purposes, and we think it more probable that said village would have supplied itself with water from other sources, provided it had not taken that of the petitioner. We are therefore of the opinion that the damages claimed upon this basis are purely of a speculative character, depending upon so many contingencies that it is impossible to tell whether or not said water rights taken from the petitioner have any value above what his farm and lands are damaged and for which we have awarded him damages, but if the court should otherwise decide the report can be re-committed for further findings."

Wing & Fay for the petitioner.

The petitioner had the right to dig and construct upon his own land for the purpose of increasing the flow from these springs, and to appropriate the increased flow. To this extent his ownership was of value. *Norton* v. *Valentine*, 14 Vt. 239; *Boynton* v. *Gilman*, 53 Vt. 17; *Lybe's Appeal*, 151 Am. Rep. 549; *Ulbricht* v. *Eufauly Water Co.*, 11 Am. St. Rep. 72 and note *Bloodgood* v. *Ayers*, 108 N. Y. 400; Gould on Waters, s. 280 *et seq*; *Chatfield* v. *Wilson*, 28 Vt. 49; *Harwood* v. *Benton*, 32 Vt. 724.

The measure of damages in the case was the value of the property taken for any purpose to which it could be legitimately put. Gould on Waters, s. 251, p. 444; Cooley's Const. Lim. (4th Ed.) p. 708; *Hooker* v. *Montpelier & Wells River Rd. Co.*, 62 Vt. 47.

J. D. Denison and N. L. Boyden for the petitionee.

The petitioner had no absolute right to appropriate the water which flowed across and away from his lands, but only to its legitimate use; and the value of that use was the measure of his damages. Gould on Waters, s. 148; *Haut's Appeal*, 125 Penn. St. 211; Wash. Ease. pp. 269, 276, 286, 304;

Godd. Ease., pp. 6, 7, 56, 57, 64, 424, 425; Ang. Wat. ss. 135, 427, 432, 433, 449; *Newhall* v. *Ireson*, 8 Cush. 595; Gould Waters, 204; *Lord* v. *Meadville Water Co.*, 135 Pa. St. 122.

The conjecturable value of those springs for the purpose of supplying the village with water was properly disregarded by the commissioners. *Patten* v. *Northern Cent. Ry. Co.*, 33 Pa. St. 426; *Donland* v. *East Brandywine & W. Rd. Co.*, 46 Pa. St. 526; *Winona etc. Rd. Co.* v. *Waldron*, 11 Minn. 515; *Wilson* v. *Rockford etc. Rd. Co.*, 59 Ill. 273; *Tide-Water Canal Co.* v. *Seabrook*, 12 Rich. 504; *Searle* v. *Lackawanna B. Rd. Co.*, 33 Pa. St. 57.

TAFT, J. delivered the opinion of the court.

I. It does not appear that the commissioners adopted an erroneous rule in the assessment of damages. They were unable to tell whether the rights taken had any value above the damage to the petitioner's farm and lands; this damage was awarded him, and it does not appear but that it was all the damage to his farm and lands resulting from the taking of the water rights put to, and valued for, any use. Such is the inference from the report.

II. The extent of the petitioner's recovery depends upon whether he had any right in the waters taken, except for his own use and with no right to sell. The water now used by the petitionee is taken from four springs, the waters of which, at the time of taking, ran in open well defined channels across the petitioner's lands, into those below his, and these waters the petitioner could use for purposes of his own, and could sell unless to the detriment of the riparian owners below. If by artificial means he increased the flow of the springs he could sell such increase, if by such sale he did not lessen the natural flow from the springs. He had a right to the water that percolated through the soil of his lands, and the right to dig and develop springs, streams, and fountains, and the water thus obtained, he could

sell. If by force of the proceedings the petitionee obtained only the right to the water that naturally flowed onto the lands below the petitioner's their claim might be urged with more effect; but they took much more, viz: "All the fountains, springs and streams and the water therefrom" on the petitioner's land, with "the right to go upon said pasture land and dig and develop fountains, springs, and streams and store and fit the same for use and dig ditches," etc. It is unjust to say that waters thus obtained were not the absolute property of the petitioner. He had the right to sell and dispose of them, and if he had, the commissioners find his damages to have been three hundred dollars, and we think he should have judgment for that sum with interest since the filing of the first award, March 4, 1887, and costs. We do not understand that the commissioners assessed the damages upon the basis that the petitioner claimed that he had a right to sell all the water that flowed upon the lands below his, but in subordination to the rights of the lower riparian owners, while the petitionee claimed that he had the right to none except such as was necessary for his own use in connection with his own land and that it was upon this basis that the assessment of the different sums was made.

Judgment reversed and judgment for the petitioner for $300.00 and interest since March 4, 1887, as damages, and costs.

STATE *v.* PATRICK HASSETT.

Intoxicating Liquor. What is furnishing.

1. One who buys intoxicating liquor with the money of another and takes it to him with intent that it be shared between them, is guilty of an act of furnishing under the statute.

2. *Held*, that the testimony in this case tended to show both a sale and a furnishing, and that the court below properly refused to direct a verdict.

Complaint for selling, furnishing and giving away intoxicating liquor, appealed from the judgment of a justice. Trial by jury at the March term, 1891, Washington County, Munson J., presiding. Verdict, guilty of one offense. The respondent excepts.

The respondent moved the court to direct a verdict for that there was no evidence tending to establish the offense alleged, and excepted to the action of the court in overruling said motion.

The nature of the evidence appears in the opinion.

He also excepted to the following charge of the court as to what would constitute a furnishing:

"For the purposes of this trial we instruct you that if the respondent procured, and knowingly transported to the witness Ewing, the liquor testified to by Ewing, from the place where it was procured to the place where it was used, knowing at the time he undertook to procure and bring it, that after being so brought it was to be shared between him and the witness Ewing, in the manner which the testimony tends to establish, the respondent is guilty of an offense under the statute."

Wing and Fay for the respondent.

Zed S. Stanton, State's Attorney, for the State.

TAFT J. delivered the opinion of the court.

1. If there was any evidence in the case tending to

show an offense under the statute forbidding the sale, furnishing or giving away of intoxicating liquor, it was the duty of the court to submit the case to the jury.

The witness Ewing testified "I asked him (respondent) if he would let me have a pint of whiskey and he said he would," and in answer to the inquiry, "Did you pay him for it" said, "Yes sir, I gave him a quarter." This testimony tended to establish a sale .The witness further testified that he gave the respondent the quarter, before the latter went for the whiskey, and that he was gone some ten, fifteen, or twenty minutes, and returned bringing the whiskey. It was a fairly debatable question upon the evidence, whether the respondent owned the whiskey that he went after, or whether he went out as the agent of the witness, and purchased it of some third party. If it was his own he went and got, the transaction was a sale; if he bought it of another, procured it for the witness and took it to him, it was a furnishing. In this latter aspect of the case, the testimony tended to establish a furnishing. There being evidence in the case to establish both a sale and a furnishing, the motion to order a verdict for the respondent was properly overruled. There was ample evidence to show either a sale or furnishing, and it was for the jury to say whether it was the one or the other.

2. That part of the charge excepted to, was applicable to the testimony tending to show a furnishing; the facts stated therein, viz: that the respondent went for the whiskey and procured it for Ewing, and took it to him, paying Ewing's money for it to some third party, might have been very properly found from the testimony before us. Whether the whiskey was to be shared between the respondent and Ewing was immaterial. If Ewing had any part of it, that part was furnished him by the respondent. If the jury did not find a sale, but did find that the respondent furnished it as the testimony tended to show, a conviction for furnishing was warranted. The complaint was the usual one under Cap. 169 R. L. for selling, furnishing and giving

away intoxicating liquors, the testimony tended to establish the offense of selling and furnishing, the charge complained of was applicable to the allegation of furnishing and was unobjectionable.

The record upon inspection discloses no error, the exceptions are overruled, judgment of guilty, and sentence upon the verdict, and execution of the sentence ordered.

CHARLES A. REED *v.* SARAH F. NEWCOMB AND HUSBAND.

Married Woman. Husband as wife's agent.

1. A married woman is liable for debts contracted about a business which is in fact hers, although conducted in the name of another person as her agent.

2. If a husband carries on a business as his wife's agent, which he holds out to the world as her business with her knowledge, consent, and approval, she is liable in respect thereto.

Assumpsit. Plea, the general issue. Trial by jury at the September term, 1890, Washington county, Munson, J., presiding. Verdict and judgment for the plaintiff. The defendant, Sarah F. Newcomb, excepts.

The defendants were husband and wife. The defendant husband made no defense.

The plaintiff sought to recover a balance due for certain cattle sold and delivered to the husband and by him slaughtered at Montpelier. The cattle were charged on the plaintiff's book to "Frank H. Newcomb"; and the evidence of the plaintiff tended to show that the said Frank H. had previously carried on, and was when the cattle were sold carrying on the butchering business in his name as the agent of his wife. The defendant wife claimed that she was not liable because the business was not carried on in her name. Upon this point the court instructed the jury as follows:

"The defendant, Sarah F. Newcomb, insists that this suit cannot be maintained against her, even if the husband was merely her agent and the business in fact hers, because she was not carrying on the business in her own name. But the court hold, for

the purpose of this trial, that if she was the actual owner of this business and was doing it through her husband as her agent, she was ' carrying on the business in her own name within the meaning of the statute'."

The other exception relied upon appears in the opinion.

T. J. Deavitt, for the defendant.

The statute only makes the wife liable when the business is carried on in her own name, and in order to charge her under the statute all its requirements must be met. *Smith* v. *Bank*, 45 Conn. 419; *Story* v. *Downey*, 62 Vt. 246; *Wright* v. *Burroughs*, 61 Vt. 390.

A married woman cannot authorize her husband to make a contract which will bind her. *Davis* v. *Burnham*, 27 Vt. 562; *Ingram* v. *Nedd*, 44 Vt. 462.

Geo. W. Wing and *T. R. Gordon*, for the plaintiff.

The statute manifestly intends that a married woman shall be liable in respect of a business carried on by her and for her benefit, whether conducted in person or by an agent; and in construing statutes like this, courts will execute their intent. *Ryegate* v. *Wardsboro*, 30 Vt. 746; *Henry* v. *Tilson*, 17 Vt. 479.

If a married woman permits her husband to act as her agent, she stands charged with his knowledge.

TAFT, J. delivered the opinion of the court.

The statute subjects a married woman to liability in connection with a business, which she carries on in her own name, the same as if she was unmarried. The female defendant insists that she is not liable in this action, because the business was carried on by her through an agent, apparently forgetting the maxim *qui facit per alium, facit per se.* We hold that if she carried on business through an agent, she was "carrying on the business in her own name within the meaning of the statute." The charge of the court to that effect was correct.

Charles A. Reed *v.* Sarah F. Newcomb and Husband.

The defendant, Mrs. Newcomb, requested the court to charge the jury "that in order to make Mrs. Newcomb liable in this case the plaintiff must show by a preponderance of evidence that she knew that her husband was doing business in her name as her agent. If there was no arrangement between them and her husband did business in the manner detailed by the evidence and she had no knowledge of it, then he could not bind her and he alone would be liable in this action."

The court charged as follows: "If Mrs. Newcomb was in fact the proprietor of this business, and was carrying it on through the agency of her husband, she is liable for whatever sum you may find due the plaintiff on account of these cattle. But if Mr. Newcomb was not the agent of his wife, and Mrs. Newcomb had no interest in the business, she is entitled to a verdict, unless you find that she knowingly permitted her husband to represent to the world that it was her business. The husband could not assume to be Mrs. Newcomb's agent without her authority, or bind her without her knowledge or consent. But even if Mrs. Newcomb was not in fact the owner of the business, if the husband held it out to the world as Mrs. Newcomb's business, with her knowledge, consent, and approval, she is liable.

The burden is upon the plaintiff to establish the facts necessary to entitle him to recover, as above indicated, by a fair preponderance of evidence as heretofore explained to you."

The request called simply for knowledge on the part of Mrs. Newcomb that her husband was carrying on business in the manner detailed in the evidence. The court went farther than the request called for, and the jury were told that such carrying on of the business must be with her knowledge, consent, and approval. There was a full compliance with the request, and no error in the charge as given.

Judgment affirmed.

D. D. WEAD *v.* ST. JOHNSBURY & LAKE CHAMPLAIN RAILROAD COMPANY.

Railroad companies. Land damages. When road is owned by different company from one constructing. Parol evidence to explain description in deed. Occupation of highway. Public officers presumed to act regularly. Land taken in constructing crossings. Damages for the obstruction of travel. By the collection of surface water. Damages and costs a lien upon rights taken.

1. Where a railroad is constructed by one company and subsequently passes into the hands of another, the second company is not, by reason of its possession of the road, liable for any taking of property in the original construction, unless it has entered into the use and possession of the lands so taken.

2. When the description in a deed refers to two or more objects, parol evidence is admissible to show which object was meant.

3. The defendant claimed title by virtue of subsequent conveyances under a deed from the orator and others dated March 29, 1882. In this and the later deeds the orator's east line was described as the east line of the highway. For many years before, the east line of the highway at that point as occupied, worked and fenced was in a certain place. In 1845 the highway was resurveyed and the easterly line established in a different place. *Held*, that parol evidence was admissible to show that in fact the east line of the highway as fenced and occupied was never changed in consequence of the resurvey, and that the parties to the deeds through which the defendant claimed, including the railroad company which had originally constructed the road, had always treated the line as fenced as the eastern boundary of the orator's land.

4. If a railroad company occupies a portion of a public highway with its road-bed, an additional burden is thereby imposed upon the land, and the owner of the fee may recover damages for the taking.

5. But when a railroad company, without objection of the municipal authorities, makes a fill upon a public highway, not for the purpose of supporting its road-bed, but to enable the public to have access to its station, no additional burden is thereby imposed, and no damages can be recovered by the owner of the fee.

6. It appeared that in the construction of the railroad an old highway was occupied, and a new one constructed and used as a substitute, for which the railroad purchased the required lands. It also appeared that the selectmen filed at that time in the town clerk's office a certificate of the survey of the new highway and a vacation of the old one. *Held*, that from these facts it should be presumed that an agreement was entered into between the selectmen and railroad company for a change in the location of the highway agreeably to R. L. ss. 3379–80, for the filing of the certificate could only be proper after the making of such an agreement, and a public officer acting under the provisions of a public statute will be presumed to have done his duty until the contrary appears.

7. It is the duty of a railroad company to construct and maintain sufficient crossings at points where its railroad intersects a public highway. If in so doing it is necessary to raise the bed of the highway an additional burden is thereby imposed upon the land for which the owner of the fee may recover damages.

8. In the construction of such crossing the railroad company may extend the fill outside the limits of the highway, and must make compensation for the additional land so taken.

9. Under R. L. s. 3370, the orator is entitled, upon the facts found by the master, to damages for the obstruction of travel to his store by the construction of the defendant's railroad.

10. If a railroad company by the construction of its embankments and culverts, collects and discharges surface water in such a manner as to injure adjoining lands, it is liable for the damages thereby ensuing, and although this defendant did not construct this railroad originally, nevertheless if it took and maintained it as so constructed it would be liable as of the date when it went into possession.

11. In estimating the damages the master should consider that a part of the land taken was a public highway and a part a private way.

12. The case must be again referred to a master to report specifically the damages to which the orator is entitled in respect of each item.

D. D. Wead *v.* St. Johnsbury & Lake Champlain R. R. Co.

18. Upon the coming in of an adequate report, a decree should be passed that the defendant is indebted to the orator in damages and costs, for which execution may issue; that the amount of such damages and costs is a lien upon the lands and rights taken, and that the defendant be perpetually enjoined from using and enjoying the same unless payment be made within a time limited.

This was a bill in chancery brought by the orator to obtain compensation for damages done his land by the construction and maintenance of the defendant's railroad. Heard at the September term, 1890, Franklin county, upon the pleadings, a special master's report, and exceptions by the defendant thereto. Taft, Chancellor, *pro forma*, overruled the exceptions and decreed that the defendant pay the damages reported by the master. The defendant appeals.

It appeared that the railroad in question was constructed in the years 1876 and 1877, by the Lamoille Valley Railroad Co. In 1876 that company issued its bonds secured by mortgage upon its railroad and franchises. Default having been made, this mortgage was foreclosed and a decree obtained in December, 1879. The terms of this decree not having been complied with, the mortgage bond-holders formed themselves into a corporation under the name of the St. Johnsbury and Lake Champlain Railroad Company. That company, being the defendant in this suit, took possession of the railroad on the first day of July, 1880, and has continued to operate the same ever since. The master found that in the proper use and occupation of the said railroad the defendant had so far maintained, and must necessarily continue to maintain the crossings, approaches, fills, slopes, and embankments now existing in reference to the orator's land.

The questions raised and decided sufficiently appear in the opinion.

C. P. Hogan and *H. A. Burt*, for the orator.

In making the fills and embankments reported by the master, and maintaining the same, the defendant has taken the ora-

tor's land within the meaning of the constitution. *Winn* v. *Rutland*, 52 Vt. 481; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Eaton* v. *B. C. & M. R. R.*, 51 N. H. 104; *Walker* v. *Old Colony & Newport Ry. Co.*, 103 Mass. 16; *Hatch* v. *Vermont Central Railroad Co.*, 25 Vt. 49; *Waterman* v. *Conn. & Pass. R. R. Co.*, 30 Vt. 610.

The necessary approaches to a highway crossing form a part thereof. *Roxbury* v. *Railroad*, 60 Vt. 121; *Burritt* v. *City of New Haven*, 42 Conn. 174, 179.

The maintenance of the fills and embankments within the limits of the highway, imposes an additional burden for which the orator may recover damages. *Williams* v. *N. Y. C. R. R.*, 16 N. Y. 97; *Henderson et al.* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423; *Brainerd* v. *Missisquoi R. R. Co.*, 48 Vt. 107; *Louisville & N. H. R. R. Co.*, v. *Finley*, 86 Ky. 295; 2 Wood Ry. Law, 722 to 723, and cases cited.

The defendant by having maintained these various encroachments upon the orator's land since 1880, is liable for the same as of that date. *Conhocton Stone Road* v. *Buffalo etc., R. R. Co.*, 51 N. Y. 573; *Dodge* v. *Stacy*, 39 Vt. 560; R. L. ss. 3461, 3470-1.

The parol evidence as to the eastern limit of the highway was properly received for the purpose of showing what the parties intended by that description in the deed. *Knight* v. *Heaton*, 22 Vt. 480; *Barnard* v. *Russell*, 19 Vt. 334; *Bayley* v. *Morrill*, 46 Vt. 94; *Tuller* v. *Baxter*, 59 Vt. 467.

S. C. Shurtleff, for the defendant.

The grading the highway east of the orator's store does not entitle him to damages. The orator's east line was the east line of the highway which must be established by the survey of 1845, and cannot be otherwise shown by parol evidence. *Smith* v. *Fitzgerald*, 59 Vt. 451; *Closson* v. *Hamlet*, 27 Vt. 728.

But suppose the grading was within the limits of the high way, still the orator cannot recover. The grading of this highway did not in any way interfere with the use of the orator or the public therein. The grading of the highway is not an alteration within the meaning of the statute. *Hutchens et al.* v. *Town of Chester*, 33 Vt. 410.

Neither is it an act for which a town or a railroad company is liable in damages. *Penniman* v. *St. Johnsbury*, 54 Vt. 306; *Richardson et al.* v. *Vt. Central Rd. Co.*, 25 Vt. 465; *Smith* v. *Washington*, 20 How. 135; *Northern Transportation Co.*, v. *City of Chicago*, 9 Otto, 625; *Markham* v. *Mayor*, 23 Ga. 402; *Dunham* v. *Hyde Park*, 75 Ill. 371; *Quincy* v. *Jones*, 76 Ill. 231; *Terre Haute* v. *Turner*, 36 Ind. 522; *Delphi* v. *Evans*, 36 Ind. 90; *Marcy* v. *Indianapolis*, 17 Ind. 267; *Calender* v. *Marsh*, 18 Mass. 416; *Brown* v. *Lowell*, 49 Mass. 172; *Detroit* v. *Beekman*, 38 Mich. 125; *Pontiac* v. *Carter*, 32 Mich. 164; *Hovey* v. *Page*, 43 Me. 322; *McCormic* v. *Patchen*, 53 Mo. 33; *Tate* v. *Missouri*, 64 Mo. 149; *Plum* v. *Canal Co.*, 10 N. J. Eq. 256; *Karst* v. *St. Paul S. & T. F. R. Co.*, 22 Minn. 118; *Fellows* v. *New Haven*, 44 Conn. 240; *New Haven* v. *Sargent*, 28 Conn. 50; *O'Connor* v. *Pittsburg*, 18 Pa. St. 187; *Furman* v. *State*, 17 Wend. 649.

It was the duty of the Lamoille Valley Rd. Co., to grade this highway for the purpose of providing a crossing, and for the discharge of that duty neither that company nor the defendant is liable. *Smith* v. *Washington*, 20 Howard, 135; *The Northern Transportation Co.* v. *City of Chicago*, 9 Otto, 625.

There can be no recovery for an alteration in the flow of surface water. *Abbott* v. *Kansas City*, St. J. & C. B. R. Co. 83 Mo. 271; *Chatfield* v. *Wilson*, 28 Vt. 49; *Beard* v. *Murphey*, 37 Vt. 104.

A change in the grade of a highway made necessarily when a railroad crosses it is not an act for which an abutting landowner can recover damages. *Uline* v. *N. Y. Central R. R. Co.*,

23 A. & E. R. C. 3; *Conklin* v. *N. Y. Ontario & Western R. Co.*, 26 A. & E. R. C. 365, S. C. 101 N. Y. 98; *Ottenot* v. *N. Y. & L. & V. R. Co.*, 23 N. E. R. 169.

TAFT, J. delivered the opinion of the court.

The constitution of this state provides in Chap. I, Art. 2, that "whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." The orator claims that his land has been taken by the defendant for the use of its road. The defendant denies it. Whether it has taken and is now using it, is the question before us upon the report of a special master.

The defendant's road was constructed by the Lamoille Valley Railroad Company about the year 1876, and the taking of the orator's land, if there was a taking, was at that time. The defendant took possession of the road in July 1880, and is not liable in respect of the acts of the Lamoille Valley Railroad Company unless it has taken possession of or used the lands taken by the latter company. There are three pieces of land which the orator claims were taken by the Valley company, and are now in the possession and use of the defendant; viz: one piece lying easterly from his store, on the opposite side, but within the limits of the highway, another piece lying north of his store, between it and a highway on its northerly side, and a third piece in the highway east of, and contiguous to, his store. These pieces are shown by the exhibit called the Tucker plans. * We will first examine the question as to the land lying opposite the store on the easterly margin of the highway. The highway runs north and south on the easterly side of the store, and whether the orator's land was taken depends to a great extent upon the location of the east line of the highway about which the parties are not agreed. The defendant concedes that the orator owns the fee of the land in the highway, and thus the

* The reporter has been unable to obtain this plan.

location of the easterly line becomes important. This piece of land is shown on the plan as the triangle B-C-F, and the margin south of it. The orator claims that the easterly boundary of the highway is the line B-C, the defendant insists that it is the line F-C. The master finds that the east line of the highway and therefore the east line of the orator's land is the line B-C. It is expressly so found unless by the deed from Wead and others to Bruce of the 29th March, 1852, and the other deeds in the defendant's chain of title, the defendant acquired title to the line F.C. These deeds in effect make the boundary of the defendant's land on the east line of the highway. The highway has been open, worked, and traveled for more than sixty years, and during that time the east line of the highway as it has been worked, occupied and fenced has been the line B-C. In the year 1845, the road was resurveyed and established (by a county court commission) with its east line in the line F-C. No actual change was made in the highway as it was used and fenced, as the result of the survey and location in 1845. Its bounds as used after the survey were as they had been prior thereto, and the line B-C was recognized as the east line of the highway by all the parties to the deeds, including the Lamoille Valley Railroad Company. These facts are found by the master, and although by the survey, the east line of the highway was the line F-C, the land owners in conveying lands bounded on the highways, could treat the surveyed line, or the line of the highway as actually occupied and used, as the east line of the highway, and the master, as we construe his report, finds that the parties, including the Lamoille Valley Railroad Company, under whom the defendant claims, did treat the line of the highway as used as the true east line of the highway. Parol evidence was admissible, not to vary the deed, but to explain it, to show the location of the east line, to show whether the parties by the description in the deed, meant one line or the other. Where a description is equally applicable to two or more objects parol evidence is admissible to explain to

which of these objects the description refers. The defendant therefore acquired no title to land west of the line B-C, and the orator owns the fee of the land in the highway, and upon a portion of it, the triangle B-C-F, as shown on the plan, and also on the easterly margin of the highway, south of the triangle and opposite the defendant's station, the Lamoille Valley Railroad Company, when they constructed the road made the embankments shown by the plan, and the master reports they must necessarily be maintained by the defendant so long as it continues to operate the railroad. The defendant does not deny that the Lamoille Valley Railroad Company extended the embankment on to the orator's land in the highway near to and opposite its station, for the master finds that in constructing its road at a point "a little south of the store said company extended its embankment within the admitted limits of the highway." In respect of this claim the defendant insists that this embankment in the highway opposite its station was and is necessary to enable the public to have free access to its station, to pass and repass to and from it; that it was not only its right but its duty, to so grade the highway that it might reasonably serve for that purpose. From the report of the master we cannot tell whether the embankment so made on the easterly side of the highway was made for the sole purpose of an approach to the station, or in part for that purpose, and in part to support, and as a part of, the road-bed; for he reports that the fills and embankments were made for the purpose of providing suitable approaches to said company's station, and to said highway and also as a support to the road-bed, without pointing out which ones were constructed for each purpose. The plan which is in evidence indicates that at the line B-C the embankment is a part of the road-bed, but that nearer and opposite the station it was so made as to render the approach to the station from the highway more easy and feasible. The orator's land which is so embanked upon, is within the limits of the highway, and is subject

to the easment of the public, the right to use it as a highway, but the orator is entitled to recover his damages, if any, which he has sustained by reason of the additional burden placed upon it by the bed of the railroad being located thereon. If the embankment or fill was made solely for the purpose of grading the highway, so that travelers could pass over it to and from the railroad station, we think the defendant is not liable as a taker of land, for the land is not used for any purpose save that for which it was originally taken when the highway was established and for which the owner was presumably paid. A railroad company may, as against the owner of the fee, the municipal authorities not objecting, grade an established highway which is an approach to their station, without being liable to pay the owner of the fee, as of an original taking. No additional burden is placed on the land. Had the municipal authorities graded the approach to the station within the limits of the highway, the orator could not, reasonably, have complained. Why should he object because the railroad company do the work and thus lighten the public burdens? In respect of this land opposite the store and on the easterly margin of the highway, so far as the filling in the street was made to grade it as an approach to the station, the defendant is not liable; so far as the fill or embankment is a part of the road-bed, or a support of it, the defendant is liable in respect of the taking.

The orator complains that another piece of his land has been taken. When the road was built in 1876, after passing the store of the orator on its easterly side, it intersected an established highway running east and west on the northerly side of the store, and which at a point northeasterly from the store turned abruptly to the north, and after the intersection the railroad was built upon the highway running northerly. The highway from the point of intersection with the railroad for some distance northerly was taken by the railroad company, its road-bed constructed thereon, and a substitute for the highway so taken was surveyed

and built, beginning at a point thirty feet north of the north-east corner of the orator's store and sixty-eight feet west of the centre line of the railroad, and running in an easterly direction, and in continuation of the highway extending from the creek bridge shown on the plan, to the point of the beginning of the new survey. In October, 1876, the selectmen of the town filed in the town clerk's office a certificate of the survey of the new highway and a vacation of the old one. This certificate, orator's exhibit No. 2, was the only evidence before the master that the town ever accepted the new highway. From this evidence, exhibit No. 2, in which the selectmen certify that they establish the new highway and disestablish the old, the master found that the town did not accept the highway unless the acts of the selectmen, evidenced by the exhibit, constituted an acceptance. The master finds that the railroad company purchased the lands necessarily required for the new road, and the certificate of the alterations made in the highway, signed by the selectmen and recorded in the town clerk's office, was made apparently under section 3379 R. L. This section and the following one, authorizes the selectmen and a railroad company to agree to any alterations in a highway necessary in the construction of a railroad, and a certificate of the alterations when agreed upon must be filed in the town clerk's office. There is nothing in the master's report showing any agreement, but from the fact that the certificate was signed by the selectmen and recorded, which was proper only when the alterations were agreed upon by the parties, (see s. 3379, R. L.) the presumption arises that legal steps were taken in changing the highway, and that the prior proceedings were regular. A public officer acting under the provisions of a statute is presumed to have performed his duty until the contrary appears. *Lycoming F. Ins. Co.* v. *Wright*, 60 Vt. 515. The proceedings in changing the highway were valid. In constructing the highway crossing, it was necessary to raise the grade of the street north of the orator's store, and in so doing the master finds

"that in order to provide suitable approaches to the crossing it was necessary to cart dirt upon the orator's land between the limits of the highway and the store." The railroad company had the right to take this land, and if taken were obliged to make compensation for it. R. L. s. 3380. Making an embankment upon the orator's land in order to widen the highway was a taking of the land, or an easement therein, for the purpose of a highway, and the last named section provides that when compensation is made for such land, "the same shall become part of such way and may be held for highway purposes." It was the duty of the railroad company to construct the crossing and keep it in good and sufficient repair, R. L. s. 3383. In so making the crossing the master finds it took the strip of land between the north end of the orator's store and the highway sixteen and one-half feet wide at its westerly end and fourteen and five-twelfths feet wide at the easterly end. The master finds that this was necessary and still is, to maintain the crossing. If this strip of land, although not a part of the road-bed, was and is a necessary part of the highway crossing, and it is so found by the master, the defendant is liable for the taking of it. Its liability is fixed by the statutes referred to, *et seq.* The master finds it was necessary in order to construct the railroad crossing to raise the level of the street east of and contiguous to the orator's store, and that the fill thus made by the Lamoille Company is a part of the railroad crossing. This fill, therefore, is an additional burden placed upon the land within the highway limits by the construction of the railroad crossing and the orator is entitled to such damages resulting therefrom as he has sustained, as the result of such superadded burden.

The orator insists that he is entitled to damages under that part of s. 3370 R. L. which reads as follows:

"When a railroad corporation in laying out, building, grading or making its roads obstructs the travel or means of access to a manufactory, mill, place of business or dwelling house, the

corporation shall be liable to pay to the person thereby injured such reasonable compensation as the commissioners for determining railroad damages deem proper." The allegations in the bill are specific that by the construction of the defendant's road and crossing, the travel and means of access to the orator's store were cut off and obstructed. The facts reported by the master fully sustain the allegations in the bill, and such damages for such obstruction as are proper should be awarded the orator.

The orator complains of another injury; the master finds that the construction of the road-bed obstructed the flow of surface water from the easterly to the westerly side of the track lying opposite the orator's store; that the Lamoille Valley Railroad Company constructed a culvert to permit the surface water to pass from the east or upper side of the road-bed to the lower side, near the orator's store, and in so doing, and as a result of making the culvert, caused the water which before that time had flowed upon the surface of the land to collect and be discharged in a body upon the orator's land west of the highway. A person is not liable for injuries resulting from the escape of surface water in its ordinary and natural courses, but he has no right to change the course of its natural escape by means of an embankment or otherwise; and if he does, he is liable for the damages that ensue. Nor can he by means of drains, ditches, or culverts, throw the surface water from his own land upon the land of another to the injury of the latter. The defendant did not make the culvert, but it has taken and is using the property of which the culvert is a part and the construction of which rendered the culvert necessary. It is therefore liable for such damages as the orator sustained by reason of the construction of the culvert, as of the time it took possession of the road in July, 1880, and the damages should be assessed as of that date.

For the orator's property thus taken he is entitled to and "ought to receive an equivalent in money." The rule as to damages is stated in R. L. s. 3359, which, in similar cases, pro-

vides for the appointment of commissioners "to determine the damages which the owners of such lands have sustained by the occupation of the same for the purposes aforesaid." In estimating the orator's damages, the fact that the land taken is in part in the highway, and in part used as a private way is a material element in determining the amount; this consideration however is solely for the master appointed to assess the damages.

We hold the defendant liable in the five following respects:

1. As to so much of the easterly margin of the highway, east of and opposite the store, as is used or embanked upon as a part of the road-bed or support thereof.

2. As to the strip of land north of and between the orator's store and the highway used and embanked upon as a part of the railroad crossing.

3. As to so much of the highway east of and adjoining the store as is embanked upon and used as a part of the railroad crossing.

4. As to the culvert under the road-bed.

5. As to the obstruction of travel and means of access to the store.

The report of the master does not show the amount of damages to which the orator is entitled in respect of the five items for which we hold the defendant liable.

The elements of the damages are so commingled, including those resulting from the ordinary running of the defendant's trains and some, in other respects, to which we think the orator is not entitled, that it is impossible to determine the damages from the facts reported. The cause must be remanded and the damages ascertained by a master whose findings should be specific in respect of each of the five items, and upon the coming in of his report the court is directed to pass a decree for the orator that the defendant is indebted to the orator in the amount of such damages with costs, and directing their payment, and that the orator may have execution for the same. That payment of

the damages and costs be made a lien upon the lands and rights of the orator taken by the defendant and unless payment is made that the defendant be perpetually enjoined from using, possessing or enjoying the lands, rights in lands, and said culvert as hereinbefore set forth and for which we hold the defendant liable. The details of the decree as to time, manner of payment of said damages, and their collection, and costs, to be determined by the court of chancery.

The pro forma decree is reversed and cause remanded with mandate.

JERRY REYNOLDS *v.* BOSTON & MAINE RAILROAD COMPANY.

Railroad companies liable for defects in foreign cars. Double deadwoods. Duty to instruct. Contributory negligence.

1. A railroad company is liable to its employees to the same extent in respect to foreign cars coming to it from connecting roads as in respect to cars owned by it.

2. The use of cars equipped with double deadwoods is not negligence *per se*, so long as they can be coupled with safety by an employee who knows how the coupling should be made and makes it with proper care.

3. A master must instruct his inexperienced servant as to those dangers in an employment, which it requires peculiar skill and knowledge to avoid, which are known to the master and unknown to the servant.

4. The defendant employed the plaintiff as a freight brakeman, knowing that he had no previous experience in this capacity. Most of the cars then being hauled over the defendant's railroad were equipped with single deadwoods, but many were equipped with double deadwoods, and such cars were liable to be found in any of the defendant's trains. In coupling cars equipped with single deadwoods, the deadwoods do not meet and the arm is extended directly into the link. With cars equipped with double deadwoods, the deadwoods do meet and the arm of the coupler must be carried above or below. When injured the plaintiff had been in the employ of the defendant some five days, had learned to couple cars equipped with single deadwoods, but had never seen and did not know there was such a thing as a double deadwood. Being called upon to make a coupling between two cars provided with these double deadwoods, he extended his arm for that purpose in the usual manner, when it was caught and crushed between the deadwoods. *Held*, that these facts tended to show negligence upon the part of the defendant in not having properly instructed the plaintiff as to this hazard.

5. *Held*, further, that the plaintiff was not guilty of contributory negligence, as matter of law, in not observing and avoiding the danger as the cars came together; especially since the evidence tended to show that with double deadwoods even, the draw-bars would meet first and be driven back.

Action on the case. Plea, the general issue. Trial by jury at the September term, Orleans county, 1890, Powers, J., presiding. The court directed a verdict for the defendant at the close of the plaintiff's evidence, to which the plaintiff excepted.

The plaintiff sought to recover for the loss of an arm occasioned by catching the same between the deadwoods of two cars, which the plaintiff was attempting to couple while in the employ of the defendant as a brakeman. The plaintiff sought to charge the defendant with negligence in two respects; first, in that the cars between which his arm was caught were of an improper construction; second, in that the defendant had not given the plaintiff proper instructions.

The evidence of the plaintiff tended to show that the cars in question were both equipped with what are known as double deadwoods, being two blocks of wood, or iron, one on each side of the draw-bar, which meet when the cars are forced together; that the business of coupling cars equipped with double deadwoods was much more hazardous for the brakeman than with cars equipped with single deadwoods; that the use of double deadwoods had been in a large measure discarded and that no cars so equipped were now manufactured for its own use by the defendant. It appeared that the cars in question belonged to the Pennsylvania Railroad Company, that they were in good order and were received loaded by the defendant for the purpose of being transported over its line of railroad. It further appeared that substantially all the cars of the said Penn. Railroad Co., were provided with double deadwoods of the same kind, and that several other important railroad systems also used them. The witnesses for the plaintiff testified that a person acquainted with

cars of this construction and the manner of coupling them, could, with the exercise of ordinary prudence, make the coupling with safety, but that there was more liability to accidents than with single deadwoods.

In respect to his second claim, the evidence of the plaintiff tended to show that with cars equipped with single deadwoods the deadwoods did not meet, and that in coupling such cars, the one making the coupling would stand upright, and extend the hand directly into the link and draw-bar, but that with cars equipped with double deadwoods, it was necessary to carry the arm eitherab ove or below the deadwoods, and that if one attempted to couple cars provided with double deadwoods in the same way that he would cars with single deadwoods, the arm would be caught between the deadwoods.

At the time of the accident the plaintiff had been in the employ of the defendant for some five or six days, and during all this time there had been a full complement of help with the train besides himself. When he hired out to the defendant, he informed the one who engaged him that he had had no experience whatever as a brakeman. He was at that time about twenty years of age, the son of a farmer, having lived some miles from the railroad, and having no acquaintance with it save as he had incidently observed it in going upon it from time to time. He testified that, when employed, the one who employed him cautioned him that the business of a brakeman was a very dangerous one, that he must look out for himself, and that the same caution was repeated to him by one or more of his fellow employees when he began work upon the train; that he had also been cautioned by the conductor of the train to look out for cars loaded with lumber; that he had been shown how to make a coupling between cars provided with single deadwoods, and had repeatedly made such couplings, but that his attention had never been called to the fact that there was, nor did he know that there was such a thing as a double deadwood; that at the time of the accident he was

called upon by the conductor in charge of the train to help in setting out a car, and that in so doing it became necessary to make a coupling between two cars equipped with double deadwoods; that the cars were moved together slowly; that he was beside the moving car, and from there walked to the stationary car, adjusted the pin in the draw-bar, then turned and entered the link, standing and extending his arm in the same manner that he had previously done in making couplings between cars provided with single deadwoods; that he did not see nor notice the double deadwoods until his arm was caught between them.

The evidence of the plaintiff further tended to show that in case of double deadwoods the draw-bars ordinarily met first, as the cars came together, but were forced under by the concussion so that the deadwoods received the shock.

C. A. Prouty and *E. A. Cook* for the plaintiff.

It should have been submitted to the jury to say whether or not the defendant had acted with ordinary prudence in putting upon its road cars equipped with double deadwoods. The evidence of the plaintiff tended to show that the use of double deadwoods was much more hazardous to the brakeman than the use of single deadwoods. A master is not obliged to adopt every new device simply because it will contribute to the safety of his employees, but he is obliged to use reasonable prudence thereto; and whether he does this is for the jury. *Wheeler* v. *Wason Mfg. Co.* 135 Mass. 294; *Washington & Geo. Rd. Co.* v. *McDade*, 135 U. S. 554; *Northern Pac. Rd. Co.* v. *Herbert*, 116 U. S. 642; *T. W. & W. Rd. Co.* v. *Fredericks*, 71 Ill. 294.

The fact that this car was a foreign car, is immaterial. By receiving it into its train, the defendant made it for the time being its own car. There was no law which obliged it to receive and transport the car if it was defective either in construction or repair. *Gottlieb* v. *New York Central &c. Rd. Co.*, 100 N. Y. 462; *Goodrich* v. *N. Y. Cent. &c. Rd. Co.*, 116 N. Y. 398; *Int.*

&c. Rd. Co. v. *Kernan*, 78 Texas 294; *Gutridge* v. *Mo. Pac. Rd. Co.*, 94 Mo. 474.

The plaintiff did not assume the risk, unless he knew of it. *Carbine's Adm'r.* v. *Ben. & Rut. Rd. Co.*, 61 Vt. 348.

It was the duty of the defendant to instruct the plaintiff. The plaintiff had been told how to couple cars provided with single deadwoods. He did not know that there was such a thing as a double deadwood. The plaintiff did know that it hauled such cars in its trains; therefore, it was the duty of the defendant to instruct the plaintiff as to the nature of these cars, and the manner in which they should be coupled, before setting him to that service. Sher. & Red. Neg. s. 203; *Miss. Pac. Ry. Co.* v. *White*, 76 Texas 102; *Louisville &c. Ry. Co.* v. *Frawley*, 110 Ind. 13; *Mo. Pac. Rd. Co.* v. *Gallbraith*, 66 Texas 526; *Greenleaf* v. *Ill. Cen. Rd. Co.*, 29 Iowa 9, 47; *Galveston Rd. Co.* v. *Garrett*, 13 S. W. Rep. 62; *Wheeler* v. *Wason Mfg. Co.*, 135 Mass. 294; *O'Neal* v. *St. Louis &c. Rd. Co.*, 9 Fed. Rep. 337; *O'Connor* v. *Adams*, 120 Mass. 431.

Whether the plaintiff was guilty of contribntory negligence, was under the circumstances of this case for the jury. It was for them to say, whether in the few moments before the cars met, and while his whole attention was concentrated upon the business in hand, he ought to have seen and avoided the danger. Sher. & Red. Neg. s. 213; *Plank* v. *N. Y. Cent. Rd. Co.*, 60 N. Y. 607; *Kane* v. *North. Cent. Rd. Co.*, 128 U. S. 91; *Lawless* v. *Conn. River Rd. Co.*, 136 Mass. 1; *Gustafsen* v. *Washburn & Moen Mfg. Co.*, 27 N. E. 179; *Washington & Geo. Rd. Co.* v. *McDade*, 135 U. S. 554.

Dickerman & Young for the defendant.

These cars came to the defendant loaded and in perfect repair. It was the duty of the defendant to receive and transport them. R. L. 3399.

A considerable number of the leading railroad systems in

the United States use cars constructed exactly as these were, and the defendant must receive cars so constructed or lose the benefit of the traffic which comes from these roads. It appeared from the testimony, that cars equipped with double deadwoods could be safely coupled by the exercise of proper care, and it has been repeatedly held, that the use of cars so constructed, is not negligence. *Michigan. Cent. Rd. Co.* v. *Smithson*, 1 Am. & Eng. Ry. Cas. 101; 45 Mich. Rep. 212; *Indianapolis &c. Rd. Co.* v. *Flanigan*, 77 Ills. 365; *Toledo &c. Rd. Co.* v. *Black*, 88 112; *Baldwin* v. *Chicago &c. Rd. Co.*, 50 Iowa 680; *Kelley* v. *Wisconsin Cent. Rd. Co.*, 63 Wis. 307; 21 A. & E. Cas. 633.

A master need not use the best appliance, but only one which is reasonably safe. *Whitwam* v. *Wis. & Minn. Rd. Co.*, 58 Wis. 408; *North. Cent. Ry. Co.* v. *Husson et al.*, 101 Penn. 1; *Ballou* v. *Chicago, M. St. P. R. R. Co.*, 54 Wis. 267.

The plaintiff was cautioned that the business which he undertook was a dangerous one, and he was at the time when injured, on the train for the purpose of learning. Having entered the defendant's employ with full notice of the risks to which he would be exposed, he must assume the hazard himself. *Hathaway* v. *Mich. Cent. Rd. Co.*, 51 Mich. 253; 2 Thomp. Neg. 976; Wait Ac. & Def. 417, and cases there cited; *I. B. and N. R. Co.* v. *Flanigan*, 77 Ill. 365; *Baldwin* v. *C. R. I and P. R. Co.*, 50 Iowa 680; *Way* v. *Ill. Cent. Rd. Co.*, 40 Iowa 341; *Ch. N. W. Rd. Co.* v. *Ward*, 61 Ill. 131; *Toledo, Wabash & Western* v. *Clark*, 88 Ill. 112; *Chicago & c. Rd. Co.* v. *Clark*, 108 Ill. 113; 15 A. & E. R. Cases 261; *O'Keefe* v. *Thorn*, 16 At. Rep. 737 (Pa.)

The fact that the plaintiff was a minor at the time he received the injury, does not vary the rule. *Goff* v. *Norfolk W. Rd. Co.*, 36 Fed. Rep. 299; *Brazil & Chicago Coal Co.* v. *Cain*, 98 Ind. 287; *Ciriak* v. *Merchants' Woolen Co.*, 146 Mass. 182; *Buckley* v. *Gutta Percha Mfg. Co.*, 113 N. Y. 540.

The deadwoods between which the plaintiff's arm was caught,

were plainly visible, and it was the duty of the plaintiff to have observed them and avoided the danger. He is guilty of contributory negligence in not having done so. 2 Thomp. Neg. 1009; *Humphrey* v. *Newport News M. V. Rd. Co.*, 33 W. Va. 135; 39 A. & E. R. Cas. 363; *Kelley* v. *Wis. Cent. Rd. Co.*, 63 Wis. 307; 21 A. & E. R. Cas. 633; *Lothrop* v. *Fitchburg Rd. Co.*, 150 Mass. 423 and cases cited.

Since there was no conflict in the evidence, the question of negligence was for the court. *Greenwald* v. *Marquette, H. & O. Rd. Co.*, 41 Mich. 197; 8 A. & E. R. Cas. 133; *Smith* v. *Potter*, 46 Mich. 258; *Mitchell* v. *Chicago & G. T. Ry. Co.*, 51 Mich. 236; 12 Am. & Eng. R. Cas. 163; *Humphrey* v. *Newport News & Miss. Val. Co.*, 33 West Va. 135; 39 Am. & Eng. Ry. Cas. 363; *Mackin* v. *B. & A. Rd. Co.*, 135 Mass. 201; *Ciriak* v. *Merchants' Woolen Co.*, 146 Mass. 182; *Lothrop* v. *Fitchburg Rd. Co.*, 150 Mass. 423. *Hart* v. *Peters*, 14 Wis. 542; *Spaulding* v. *Ch. & N. W. Rd. Co.*, 33 Wis. 582–9; *Read* v. *Morse*, 34 Wis. 315; *Ballou* v. *Ch. & N. W. Rd. Co.*, 54 Wis. 257; *Kan. Pac. Ry. Co.* v. *Butts*, 7 Kan. 308; *Fleming* v. *W. Pac. Rd. Co.*, 49 Cal. 353; *Barton* v. *St. Louis & Iron M. Rd. Co.*, 52 Mo. 253–8; *Fletcher* v. *Atlantic &c. Rd. Co.*, 64 Mo. 484; *East Tenn., Va. & Ga. Rd. Co.* v. *Bayliss*, 74 Ala. 150; *Herring* v. *Wilmington &c. Rd. Co.*, 10 Iredell 452 (N. C.); *Biles* v. *Holmes*, 11 Ired. 16 (N. C.); *Anderson* v. *Cape Fear Steamboat Co.*, 63 N. C. 399; *Grigsby* v. *Chappel*, 5 Rich. 443 (S. C.); *City of Indianapolis* v. *Cook*, 99 Ind. 10; *Goshen* v. *Smith*, 92 Penn. St. 435–8; *Philadelphia &c. Rd. Co.* v. *Ritchie*, 102 Penn. St. 425; *Johnson* v. *Hudson Rd. Co.*, 20 N. Y. 73; *Wilds* v. *Hudson River Rd. Co.*, 24 N. Y. 430; *Fox* v. *Town of Gladstonbury*, 29 Conn. 204–8; *Toomey* v. *London &c. Ry. Co.*, 91 E. C. L. 566, 571–2; *Randall* v. *Balt. & Ohio Rd. Co.*, 109 U. S. 478; *Goodlett* v. *Louisville & Nash. Rd. Co.*, 122 U. S. 391; *Latremouille* v. *Ben. & Rut. R. Co.*, 63 Vt. 336-344.

Jerry Reynolds *v.* Boston & Maine Railroad Company.

TAFT, J. delivered the opinion of the court.

After the plaintiff rested in the opening of his case the defendant moved for a verdict upon the ground that there was no testimony tending to show that the defendant was negligent in receiving or hauling the cars which caused the injury to the plaintiff, nor in cautioning the plaintiff about the work that he was to do. The plaintiff claimed to recover upon both grounds. The cars causing the injury did not belong to the defendant, were not of its construction, but came to it, in the course of its business, from a connecting road. It is difficult to see any distinction between the liability of the defendant in respect of its own cars, and those belonging to another road, coming to it for transportation over its line. If any part of the equipment of a car is not safe and suitable when annexed to its own property, it is doubtful if the statute would compel it to transport cars belonging to others equipped in the same manner. Conceding that the statute imposes an obligation upon the defendant to receive and forward cars coming to it from a connecting line, it may well be questioned whether it could be compelled to receive those dangerous in their construction, or deadly in their use. The defendant urges that in addition to the obligation imposed upon it by statute to receive such cars, that unless it does so, it will lose its through business. Whether such would be the result is at least problematical. It might be the means of compelling connecting roads to provide their cars with suitable equipment. Whatever might be the result in respect of a loss of business, we know of no legal reason for relieving a company from liability for its negligence in order to enable it to retain its business. We think the testimony did not tend to show negligence in the defendant in receiving and forwarding cars equipped with double deadwoods: that with suitable instructions to a brakeman double deadwoods are as safe as single ones; if this was the only question in the case we should be inclined to affirm the ruling of the court below.

The important point in the case is the claim of the plaintiff that the defendant neglected to give him suitable instructions in regard to coupling cars equipped with double deadwoods. Upon this claim, the testimony of the plaintiff tended to show that he was employed by the defendant as a brakeman upon one of its freight trains, and when in the line of his duty, was injured in an attempt to couple two cars equipped with double deadwoods; that freight cars are equipped with deadwoods either single or double; that in coupling cars with single deadwoods, the latter do not meet, being prevented from meeting by a shoulder upon the draw-bar, leaving a space between them sufficiently wide for the brakeman to use his arm in handling the coupling pin. That with double deadwoods, when the cars come together, the deadwoods meet. That coupling freight cars is a very dangerous business, with either kind of deadwoods. That he was a young man, ignorant of railroad service, inexperienced in coupling cars, and at the time of the accident had not observed cars with double deadwoods. That defendant employed him, knowing of his ignorance and inexperience, put him at work as brakeman, gave him no instructions as to coupling cars, save as to certain danger from cars loaded with lumber. That within a few days he learned to couple cars with single deadwoods, but that in his first attempt to couple double deadwood cars, he lost an arm. That the manner of coupling the two kinds was essentially different, that in coupling cars equipped with double deadwoods the arm and hand must be kept above or below the deadwoods instead of between them as in the case of single deadwoods, as the double ones meet, while the single ones do not. That double deadwood cars were brought onto the defendant's road daily in large numbers, that one might reasonably be expected in any train. That about the sixth day of this service, he was called upon suddenly to couple the two parts of a train, and attempted to do it; that the cars were equipped with double deadwoods, and he, not noticing the difference, made the attempt in his usual way; that his arm was

caugh at once and crushed between the deadwoods. These are the main facts indicated by the plaintiff's testimony. Did he have the right to have them submitted to the jury?

When an employer engages one to perform a dangerous service which requires caution and the exercise of peculiar skill, knowing that he is without experience and ignorant of its dangers, it is the duty of the employer to give the employee suitable instructions and warnings, as to the dangers he is likely to meet in the performance of the services he is engaged in and is required by the employer to perform. The defendant does not seriously contend against this rule, but insists that at the time of the accident, it was using all reasonable means to instruct the plaintiff as to the duties of his position, the dangers of the work and how to avoid them. But this very fact was one that the plaintiff had the right to have the jury pass upon, for the court cannot say as matter of law that the defendant was fulfilling its duty in respect of instructions. In his few days of service he had learned to couple single deadwood cars, and had been warned of danger from cars loaded with lumber, but his testimony tended to show that he had not been instructed as to double deadwood cars, not even informed of their existence. In this respect we think it tended to show negligence in the defendant in not giving him suitable instructions as to the manner of coupling them and its dangers. It did not suffice for the defendant to tell the plaintiff, that he must be careful, that the business was highly dangerous; this must have been apparent to any one of ordinary observation. He should have been told in what the dangers consisted and how to avoid them and given suitable instructions as to his duties.

The defendant makes the further objection that the accident was caused by the plaintiff's own negligence. There is no doubt abont the rule of law invoked by the defendant in this respect. Conceding the negligence of the defendant, if that of the plaintiff contributed in the least degree to the accident there can be

no recovery. But this was not a question for the court as the evidence then stood before it. It was a proper question for the jury. It is true that at the time of the accident the plaintiff could see the drawbars, he could see the double deadwoods, the cars were fast coming together, he had at the most but a few seconds to make any observations or examine the appliances for connecting them. If it was apparent to him at the time, that the deadwoods would meet under any circumstances, the claim of the defendant might be urged with some force, but the question is was he negligent in not observing that they would meet, that the draw-bars were so constructed that they would be pushed back under the cars so that the deadwoods would meet. In all the cars which he had then handled the draw-bars prevented the deadwoods from meeting; he had but a few seconds to observe and act, and to say as matter of law that he was negligent in not noticing that the double deadwoods would meet is to hold him to a rule which we think is too strict. It was for the jury to say whether under all the circumstances he was negligent. It is true that a servant assumes the known and obvious dangers attendant upon his entering and continuing in the employment in which he is engaged, but this rule does not relieve the employer from the duty of giving the servant suitable instructions as to the peculiar dangers of the service. The dangers may be obvious to an experienced brakeman, but an inexperienced one, or one with no instructions may fail in perceiving them. The service is fraught with danger. Railroad statistics show that one brakeman is killed and more than twenty are wounded in the United States daily, in coupling and uncoupling cars; experts in the service often suffer, much more the ignorant and inexperienced. The equipment of the car which caused the plaintiff's injury is appropriately denominated the "deadwood," for whatever gets between them, is thereafter "as dead as a door nail." A brakeman's body or arm is a frail instrument when used to stop a moving freight train. A master must not expose a servant ignorant of the

great dangers of the service and inexperienced in the manner of performing them even with his consent to such dangers without instructions and cautions sufficient to enable him to do his work as safely as the circumstances by which he is surrounded permit, he exercising reasonable care and prudence on his part. An experienced man may safely do a service involving obvious danger while certain injury would follow the attempt to do it by one inexperienced or without instructions; an inexperienced man may see the danger but be ignorant of the risk and of the manner of performing the work so as to avoid injury therefrom. This case is a good illustration of the reasonableness of the rule requiring instructions and cautions by a master of the hazards of the service, in which the servant is engaged. Had the plaintiff been informed of double deadwoods and shown how to couple cars equipped with them, he would undoubtedly have avoided the injury, the master at least would not have been in fault. An object lesson of thirty minutes duration, would no doubt have been sufficient to teach him the mode of coupling cars equipped with double deadwoods and the dangers incident thereto. The testimony tending to show negligence in the defendant in the respect indicated and that the plaintiff was in the exercise of due care, the case should have been submitted to the jury. In failing to do this there was error in the ruling of the court below, for which the

Judgment is reversed and cause remanded.

SARAH E. BILLINGS *v.* ACCIDENT INSURANCE Co. OF NORTH AMERICA.

Life insurance. Death by suicide, sane or insane.

Under a policy of life insurance containing a condition that the insurer shall not be liable if death results from "suicide, sane or insane," there can be no recovery where the assured takes his own life, although he acts in obedience to an insane impulse which has overcome his will.

Assumpsit upon a policy of life insurance. Plea, the general issue, and notice of special matter. Trial by jury at the March term, Rutland county, 1889, Ross, J., presiding. The plaintiff offered certain evidence, as stated in the opinion, which the court refused to admit. Thereupon the case was withdrawn from the jury and passed to supreme court upon the exception of the plaintiff for the determination of the question raised by this offer.

Bromley & Clark, and *H. A. Harman*, for the plaintiff.

It has been repeatedly held that where the policy excepts "suicide," the exception does not apply if life is taken under an insane impulse. *Breasted* v. *Farmer's L. & T. Co.*, 4 Hill 73; 8 N. Y. 299; *Am. L. I. Co.* v. *Isett*, 74 Pa. St. 176; *Mutual L. I. Co.* v. *Terry*, 14 Wall. 580; *Charter Oak L. I. Co.* v. *Rodel*, 95 U. S. 232; *Manhattan L. I. Co.* v. *Broughton*, 109 U. S. 121; *Merritt* v. *Cotton States L. I. Co.*, 55 Ga. 103; *Phillips* v. *La. E5. L. I. Co.*, 26 La. Ann. 404; 26 Am. Rep. *John Hancock M. L. I. Co.* v. *Moore*, 34 Mich. 41; *Sheffer* v. *Nat'l. L. I. Co.*, 25 Minn. 534; *Conn. Mut. L. I. Co.* v. *Groom*, 86 Pa. St. 92; *Hathaway* v. *Nat'l. Life Ins. Co.*, 48 Vt. 333; *Blackstone* v. *Standard L. & A. I. Co.*, 42 N. W. 156.

There can be no "suicide" unless the taking of one's own life is intentional; otherwise it is a mere accident. *Pierce* v. *Travelers Ins. Co.*, 34 Wis. 389; *Bigelow* v. *Berkshire L. I. Co.*, 93 U. S. 284; *Mut. Ben. L. I. Co.* v. *Davies, Ky. Ct. App.* 9 S. W. Rep. 812, and see opinion of Earl C. in 65 N. Y. 243; *Accident Ins. Co.* v. *Grandal*, 120 U. S. 527; *Horn* v. *Anglo-Austr. Ins. Co.*, 30 Law Jour. N. S. Ch'y. 511.

Henry Ballard and *J. C. Baker* for the defendant.

The contract of insurance expressly provided that the defendant should not be liable if the assured died by suicide, whether that act of self-destruction was voluntary or prompted by an insane impulse. That contract was a valid one and should be enforced. *Bigelow, Admx.* v. *Berkshire L. I. Co.*, 93 U. S.; *Deyorza* v. *Knickerbocker L. I. Co.*, 65 N. Y. 232; *Terry* v. *L. I. Co.*, 82 U. S. 236; *Pierce* v. *Traveler's Ins. Co.*, 34 Wis. 389; *Adkins* v. *Col. L. I. Co.*, 35 Am. Rep. 410; *Cooper* v. *Mass. Mut. L. I. Co.*, 102 Mass. 227.

The opinion of the court was delivered by

TAFT, J. It is a condition of the policy in question that it shall not cover a case if death results from suicide, (sane or insane). It is not denied by the plaintiff but that the assured died from the effects of a pistol shot fired by himself, but she insists and offered testimony to show that when the insured so fired the shot, his mind had become so dominated and controlled by an unnatural impulse to fire said pistol into his own forehead that his will could not resist said impulse, and that he did not voluntarily or intentionally fire the same, but in obedience to such impulse. That at the time when said shot was so fired, deceased had "become mentally incapable of understanding and appreciating the physical nature and consequences of the act he was then committing, and did not understand or appreciate the same, and did not

then know nor recognize the fact that by so firing that pistol he would take his own life."

Life insurance companies long since inserted in their contracts a clause of non-liability in case the assured died by "suicide" or "by his own hand," which courts have construed as synonymous terms. In construing this clause, courts have widely differed, some, notably those of England, Massachusetts and New York, holding that no recovery can be had in case of self-destruction, however insane the act of the assured might have been, while others, including this court, in *Hathaway* v. *National Life Ins. Co.*, 48 Vt. 335, have held that when one's reason, and judgment had become so impaired, that his mind was overthrown and he could not resist the insane idea that he must take his own life, although his mind in that condition contrived the means, and his physical strength carried them out and took his life, that such self-destruction did not void the policy. After the decisions holding companies liable in case of suicide by the assured while insane, many companies inserted the condition of non-liability in case of "suicide, sane or insane." This clause has been before the courts for construction, and the decisions generally are, that a company is not liable if the assured designedly dies by his own hand, *i. e.* if he commits the act intentionally with knowledge of its consequences, although unconscious of its criminal character. This is as far as many of the courts have been required to go upon the facts before them, but the question has arisen in some instances, as to the liability of the insurer in case the assured destroys himself in such an insane condition as to be incapable of understanding the physical nature and consequences of the act he was doing; did not know that by firing the pistol, hanging himself, or doing like acts, he would take his own life. That the insurer is liable in such cases is maintained apparently, in *Mut. B. L. Ins. Co. Davies* v. 87 Ken. 541, and *Adkins* v. *Col. L. Ins. Co.*, 70 Mo. 27, and perhaps some other cases. We think the contrary rule the better doctrine. The parties contracted, and the condition is

expressed in terms not easily misunderstood; the words are "nor will it (the policy) cover death or injury, resulting from suicide (sane or insane)." It is not contended that the insured was in any way misled, nor that the contract was contrary to sound morals or public policy. If the insured can contract against hazardous occupations, residence within the tropics in July and August, death in a duel, by the hands of the law, in war, or when intoxicated, why can they not limit their liability in case of suicide, felonious or otherwise? It is our duty to construe the contract made by the parties, not contract for them. The better construction to give a term or phrase in a contract is the one according to its ordinary and common meaning, as mankind would generally understand it. The defendant evidently was unwilling to incur the perils of insanity, and this clause limiting its liability was inserted for its protection. It was a valid contract. The defendant had the right to say that it would not hold itself responsible for the acts of the assured, committed when insane, and the question is, can the court with such a contract before it, attempt to measure the degrees of insanity. The construction contended for by the plaintiff renders the words "sane or insane," immaterial, surplusage, of no force whatever. They must have been inserted for some purpose. Felonious suicide was not alone in the contemplation of the parties to the contract. If it had been there was no necessity of adding anything to the general words. The defendant says that by force of them we are not to be liable in case the assured dies by suicide, sane or insane, and the only answer is, it is true the assured died by his own hand when insane, but he was very insane in fact so insane that when he took his life he did not know what he was doing, nor the effect of his acts. If we adopt this construction of the contract, we add to it an element not agreed to by the parties. If the death of the assured was caused in the manner and under the circumstances stated in the plaintiff's offer of evidence, the defendant is

not liable. There was nothing in the evidence nor offer of evidence tending to show an accidental discharge of the pistol, nor that death resulted from anything save the pistol shot fired by the assured. We hold there can be no recovery if the assured committed the fatal act otherwise than accidentally; that the clause "suicide, sane or insane," was intended to, and does include self-destruction irrespective of the assured's mental condition at the time of the act which caused his death. This is the better rule, in that it gives effect to the contract made by the parties, and the logical conclusion of the better considered cases. *De Gogorza* v. *Knick. Life Ins. Co.* 65 N. Y. 232; *Pierce* v. *Trav. Ins. Co.*, 34 Wis. 389; *Scarth* v. *Security M. L. Society*, 75 Iowa 346 (39 N. W. Rep. 658); *Bigelow* v. *Berk. L. Ins. Co.*, 93 U. S. 284; *Chapman* v. *Rep. L. Ins. Co.*, 6 Biss 238, (5 Big. L. & A. Ins. 110); *Riley* v. *Hart. L. & A. Ins. Co.* 25 Fed. Repr. 315; *Streeter* v. *West U. M. L. A. Soc.* 65 Mich. 199.

The construction of, and ruling of the court upon, the clause of the contract in question is sustained.

Under the agreement of the parties *the cause is remanded.*

Rowell, Munson and Start, JJ. concur.

Tyler and Thompson, JJ. dissent.

Joseph A. Wing, Admr. *v.* Christopher S. Spaulding and others.

JOSEPH A. WING, ADMR. *v.* CHRISTOPHER S. SPAULDING AND OTHERS.

Interpleader. Interest of orator. When objection may be made.

1. A bill of interpleader will not lie if the orator has any interest in the fund.
2. Where the fund is the amount collected upon a non-negotiable instrument which one of the defendants gave the orator to collect upon the understanding that he should apply whatever was collected upon her indebtedness to him, he has such an interest in the suit that he cannot maintain interpleader.
3. This objection may be urged upon the coming in of a master's report after a trial upon the merits, when there has been no decree of interpleader, and some of the defendants have answered setting up the fact of interest in the orator.

This was a bill of interpleader and was heard upon the pleadings and a master's report at the March term, 1891, Washington county, Munson, Chancellor, decreed, *pro forma*, that the orator be discharged upon payment of the fund into court, and that the fund belonged to Mrs. Robinson. The defendants Spaulding appeal.

The orator was the administrator of Mary A. Spaulding, and as such had collected $472, which was the fund in question, upon a non-negotiable instrument payable to his intestate. This fund was claimed by the defendant, Mrs. Robinson, for the reason that Mrs. Spaulding had given the instrument to her in her lifetime, and by the other defendants as the heirs of Mrs. Spaulding, who claimed that, if the gift was ever made, it was void by reason of the mental incapacity of the donor.

Joseph A. Wing, Admr. *v.* Christopher S. Spaulding and others.

All the defendants, except the Robinsons, joined in an answer denying the gift, and setting forth that Mrs. Robinson was indebted to the orator, and had put this instrument into his hands to collect with the understanding that whatever was realized should be applied on that indebtedness, wherefore this bill of interpleader would not lie.

The case was referred to a master and a full hearing was had upon all the issues of fact involved. The master found, among other things, that the orator received the instrument from Mrs. Robinson upon the understanding that he should apply whatever he collected upon her indebtedness.

J. A. Wing, for the orator.

If a bill of interpleader cannot be maintained, the defendants have waived their right to make that objection by going to a trial upon the merits. *Holt* v. *Daniels*, 61 Vt. 89; *Waterman* v. *Buck*, 63 Vt. 544; citing *Lincoln* v. *Murphy*, 63 Vt. 278.

W. P. Dillingham and *E. A. Heath*, for the Spauldings.

The orator was the attorney of Mrs. Robinson in the collection of this fund, and he cannot have a bill of interpleader because some third person lays claim to the money of his client in his hands. *Marvin* v. *Elwood*, 2 Paige Ch. 374, 375.

Nor as administrator as between the heirs of the estate and an adverse claimant. *Adams* v. *Dixon*, 19 Ga. 513; *Blue* v. *Watson*, 59 Miss. 619, 626.

So long as he has any other remedy he cannot invoke this. *Oil Run Petroleum Co.* v. *Cady*, 6 W. Va. 525; *Dry Dock etc.*, *Church* v. *Carr*, 2 Barb. 60; *McDonald* v. *Allen*, 37 Wis. 108.

Still further, the orator himself has such an interest in the fund that he cannot maintain the suit. *Hoggart* v. *Cutts*, 1 Cr. & Ph., 204, Cited in Dan. Ch. Pl. and Pr. 1753; *Horton Ex'r.* v. *Baptist Church*, 34 Vt. 313; *Bedell* v. *Hoffman*, 2 Paige Ch.

199; *Killian* v. *Trustees of Church*, 110 U. S. 568; *Lincoln* v. *R. & B. Rd. Co.*, 24 Vt. 640; *Hathaway* v. *Foy*, 40 Mo. 540; *How. Mch. Co.* v. *Gifford*, 66 Barb. 599; *Stevenson* v. *Anderson*, 2 Ves. & B. 410; *Mt. Holly Turnpike Co.* v. *Firree*, 2 C. E. Greene, (N. J.) 117, 122; *Starling* v. *Brown*, 7 Bush. (N. Y.) 164; *Manby* v. *Robinson*, L. R. 4 Ch. App. 347; *Blue* v. *Watson*, 59 Mass. 619.

Nor need this objection be made by demurrer. *Cullen* v. *Dawson*, 24 Minn. 66; *Yates* v. *Tisdale*, 3 Edw. Ch. 71; *Bank* v. *Bangs*, 2 Pai. Ch. 570.

Wing and *Fay*, for Mrs. Robinson.

The opinion of the court was delivered by

ROWELL, J. This is a bill of interpleader, brought to compel the defendants to interplead in respect of money collected by the orator on behalf of the defendant Mrs. Robinson on a non-negotiable obligation given to her mother, the intestate, by her brothers, Christopher C. Spaulding and Nathan R. Spaulding, who are defendants, and who claim that the money belongs to their mother's estate and not to Mrs. Robinson, who claims it by gift from her mother in her lifetime.

The bill does not allege that the orator has no interest in the money, nor was there annexed to it an affidavit that the orator was not in collusion with any of the defendants; but no demurrer was filed. Interpleader was not decreed, but the bill was answered, and all the defendants excepts Mrs. Robinson and her husband alleged interest in the orator and collusion by him with the Robinsons. The case was referred to a special master to ascertain and report the facts on the issues raised by the answers, and on the coming in of the report the case was set down for hearing on bill, answers, and the master's report, and a decree was entered that the orator pay the money into court and thereupon be discharged from further liability in respect

thereof, with costs to be paid out of the fund, and that the fund belonged to Mrs. Robinson and be paid to her.

The master finds that when the orator took said obligation from Mrs. Robinson to collect, she verbally turned it out to him to apply, when collected, on her indebtedness to him, and it is objected that the bill cannot be maintained because of such interest in the orator.

The remedy of interpleader is intended for the relief of those only who occupy the position of mere stakeholders and are in danger of being drawn into a controversy in which they have no concern. It is, therefore, of the essence of an interpleader suit that the orator should be entirely indifferent between the conflicting claims, having no interest himself in the fund or other thing in dispute. Story's Eq. Pl. s. 297; 3 Dan. Ch. Pr. & Pl. 1754. The attitude of the orator in such a bill is thus defined by *Lord Chancellor Cottenham* in *Hoggart* v. *Cutts*, Cr. & Ph. 197: "The definition of interpleader is not, and cannot be, disputed. It is where the plaintiff says, 'I have a fund in my possession in which I claim no personal interest and to which you, the defendants, set up conflicting claims. Pay me my costs and I will bring the money into court and you shall contest it between yourselves.'" His relation to the controversy must be such that on interpleader decreed he can step out of the case altogether. When, therefore, the orator has a personal interest in the fund, his position is not one of indifference, and he cannot maintain his bill. And not only must he be disinterested when he brings his bill, but he must continue to be disinterested—his position must be one of "continuous impartiality."

But it is claimed that the objection of interest in the orator cannot be made now, but should have been made at an earlier stage of the case, before answer and trial on the merits. But in the absence of a decree of interpleader, we think the objection can be taken at the hearing. How it would be if such a decree had been made, we have no occasion to determine. In this con-

nection it must be remembered that interest or want of interest is not mere formal matter, but goes to the very right of maintaining the bill.

In *Toulmin* v. *Reid*, 14 Beav. 499—S. C. 21 L. J. N. S. 391—Sir John Romily, Master of the Rolls, held that it is open to a defendant in an interpleader suit to show at the hearing that the case is not one proper for requiring the defendants to interplead, and that he is not precluded by not objecting by demurrer nor on motion to pay the money into court. He says that otherwise, assuming the case to be one not proper for a bill of interpleader, the orator would have nothing to do but to suppress part of the facts, or to mistate them in such a way that the bill would not be demurable. It is true that the bill in that case was not dismissed, but it was because no one asked to have it dismissed. *Statham* v. *Hall*, 1 Tur. & Rus. 30, was a bill to compel the defendants to interplead in respect of a bond that had been deposited with the plaintiff for safe keeping. On the part of some of the defendants evidence was offered that plaintiff retained the bond under an indemnity from the other defendants. It was objected by the plaintiff that the evidence was not admissible, and in support of the objection it was argued that no evidence could be admitted on a bill of this description to affect the plaintiff, and the question of indemnity was not in issue between the parties. But the evidence was admitted as forming a material feature of the case, and the case was afterwards argued on the merits and the bill dismissed with costs. In *Yates* v. *Tisdale*, 3 Edw. Ch. 71, the bill was answered, and instead of taking the usual course of practice applicable to bills of interpleader, replications were filed and proofs taken, and the case fully heard on the merits. The *Vice-Chancellor* held it allowable practice to object at the hearing to the propriety of filing the bill, and considered and adjudged that question. In *Mount Holly, &c., Turnpike Co.* v. *Ferree and others*, 17 N. J. Eq. 117, no demurrer was filed, and the answers were addressed solely to the question of right raised by the bill.

No objection was made as to the propriety of the remedy. Evidence was taken, and the question elaborately discussed on its merits. On final hearing objection was first made to the form of the remedy. Supposing that the failure to file a demurrer and the acquiescence of the defendants had cured the difficulty and that the rights of all parties could be finally determined by the decree, the Chancellor prepared an opinion on the merits, holding the right to be clearly with the defendant Ferree, but on reflection he became satisfied that no final decree of that character could be made, and that it was not a case for interpleader at all, because the evidence afforded strong ground for presuming that there was collusion between the complainant and one of the defendants; and for that reason the bill was dismissed with costs.

We hold, therefore, that in the case before us the orator cannot maintain his bill because of his interest in the money in controversy.

No costs in this court will be allowed the defendants Robinson because they knew of the orator's interest but did not disclose it.

Decree reversed and cause remanded, with directions to dismiss the bill with costs in this court to all the defendants except the Robinsons. Costs in the court below to be determined by that Court.

LEAVITT HUNT *v.* FRANCIS B. HAYES.

Husband and wife. Necessaries. Other means of support. Infant.

1. A husband is not liable for necessaries furnished his wife who is living apart from him for a justifiable reason, provided she has adequate means of support from other sources; and an ante-nuptial agreement may afford such means.
2. Whether such means are adequate is for the jury.
3. *Dictum*, that it is impossible to say from the record whether the defendant is liable for necessaries furnished his infant son who was living with the mother.

General assumpsit. Plea, the general issue. Trial by jury at the December term, 1889, Windsor county, Taft, J., presiding.

The plaintiff was the father of the defendant's wife, and brought this suit to recover for necessaries furnished in the support of his daughter and her infant son who were residing in the plaintiff's family. It was conceded by the defendant that the items sued for were necessaries, and that the wife was living apart from her husband under such circumstances as would justify her in pledging his credit for necessaries, unless she was prevented from doing so by the fact that she had other means of support; and the defendant introduced evidence of an ante-nuptial agreement by which it was provided that he would pay to his wife the sum of $2000 annually. The plaintiff upon his part conceded that the $2000 had been regularly paid, but contended that the defendant was liable for the support of his wife and infant son notwithstanding.

The court ruled that the defendant was liable to the same extent and in the same manner as though no ante-nuptial agreement had been made, to which the defendant excepted.

Inasmuch as both parties desired a determination of this question before a trial was had upon the merits of the case, the case was withdrawn from the jury, and the defendant's exceptions certified to the Supreme Court.

The child referred to was a son of the defendant, born June 7, 1888, who had lived at the plaintiff's house with his mother.

Gilbert A. Davis and *Dillingham & Huse*, for the plaintiff.

The amount paid the wife in virtue of the ante-nuptial agreement was her property, over which the husband had no control. *Imlay* v. *Huntington*, 20 Conn. 146; *Wert* v. *Howard*, 20 Conn. 587.

A husband is bound to provide for the support of his wife according to his station in life. 1 Black. Com. 356; 2 Kent, Com. 133.

And the fact that she has separate property does not affect the husband's obligation. Sch. Dom. Rel. 206; *Meth. Ep. Ch.* v. *Jacques*, 1 Johns. Ch. 450, 456, 458; *Hallahan* v. *Patterson*, 4 Texas, 61; *McLeod* v. *Board*, 30 Texas 244; Staple's Appeal, 52 Conn. 425; *Cunningham* v. *Reardon*, 98 Mass. 538; *Garvey* v. *McCue*, 3 Redf. (N. Y.) 313.

The ante-nuptial agreement does not relieve the husband from this duty. 1 Par. Cont. 359; *Frost v. Willis*, 13 Vt. 202; *Rumney* v. *Keyes*, 7 N. H. 571.

Where the wife is forced to leave her husband by his misconduct, she has implied authority to pledge his credit for necessaries. *Rawling* v. *Vandyke*, 3 Esp. 251; 1 Par. Cont. 353; *Norcross* v. *Rogers*, 30 Vt. 590; *Brown et al.* v. *Mudgett*, 40 Vt. 71.

And this is so, although she has separate estate of her own adequate to her support. 1 Bish. Hus. and Wife, s. 894; Bro. Dom. Rel. 40; *Lamb* v. *Melins*, 5 Ves. 520.

A wife who is justified in living apart from her husband may pledge his credit, not only for her own support, but also for

that of her infant child. *Reynolds* v. *Sweetser*, 15 Gray 78; *Rawlyns* v. *Van Dyke*, 3 Esp. 250; *Frost & Co.* v. *Willis*, 13 Vt. 204; *Gill* v. *Read*, 5 R. I. 543; Sch. Dom. Rel. 345; Bro. Dom. Rel. 40; *Hayden* v. *Hayden*, 4 Cl. & Fin. 323.

William Batchelder and *William E. Johnson*, for the defendant.

The defendant was not liable for necessaries furnished his wife if she had a sufficient separate maintenance; and whether she had, was a question for the jury. *Liddlow* v. *Wilmot*, 2 Star. 86; 2 Star. Ev. s. 700; 1 Par. Cont. 362; 2 Smith's Lead. Cas., *Seaton* v. *Benedict*, 497; *Clifford* v. *Laton*, 3 C. & P. 15; *Dixon* v. *Hurrell*, 8 C. & P. 717; *Litson* v. *Brown*, 26 Ind. 489; *Eiler* v. *Coull*, 99 Ind. 376; Chit. Cont. s. 173.

The common-law made the husband liable for the support of his wife when living separate from him, because otherwise she would be a burden to the community. Sch. Dom. Rel. s. 61.

It is universally held that a wife who has separate estate ample to her support is not entitled to alimony, and this principle is analogous to the one contended for by the defendant. *Holmes* v. *Holmes*, 4 Barb. 295; *Porter* v. *Porter*, 41 Miss. 116; *Whispell* v. *Whispell*, 4 Barb. 217; *Wright* v. *Wright*, 6 Texas 29; *LaBarron* v. *LaBarron*, 35 Vt. 375; *Smith* v. *Smith*, 2 Phill. 152; *Cooke* v. *Cooke*, Phill. 40; *Street* v. *Street*, Ad. Ec. Rep. 1; *Fred* v. *Ives*, 4 Har. 385.

It was the duty of the defendant's wife to apply the proceeds of the ante-nuptial agreement to her support. *Trary* v. *Boothe et al.*, 37 Vt. 78; *Brown* v. *Mudgett*, 40 Vt. 68; *Norcross* v. *Rodgers*, 30 Vt. 588; Stewart Hus. & Wife, s. 95; *Woodard* v. *Barnes*, 43 Vt. 330.

The father is in no case liable for the support of a minor child not living in his family, except by contract. *Gordon* v. *Potter*, 17 Vt. 348; *Van Valkenburg* v. *Watson*, 13 Johns. 480; *Brainbridge* v. *Pickering*, 2 W. Black. 1325; *Hack* v. *Tolle-*

mache, 11 E. C. L. 296; *Ramsey* v. *Ramsey*, Ind. Sup. Ct. Dec. 10, 1889, 41 Alb. L. J. 147, and cases cited.

The opinion of the court was delivered by

ROWELL, J. The authority of a wife to pledge the credit of her husband for necessaries is usually regarded as a delegated authority and not as an inherent authority; and it is considered that if she binds him at all in this behalf she binds him only as his agent. But this authority or agency may be a presumption of law as well as an inference of fact; and it must be a presumption of law when an agency in fact, express or implied, is either not proved or is expressly disproved, as is often the case. Thus, in *Harrison* v. *Grady*, 13 L. T., N. S., 369, it is said that when a wife is turned out of her home without the means of obtaining necessaries, it is an irrebuttable presumption of law that she has her husband's authority to pledge his credit for necessaries; but that when husband and wife are cohabiting, it is a presumption of fact that she is his agent for ordering articles supplied to their establishment that are suitable to the station that he allows her to assume, but that if they are not suitable to that station, a presumption arises that she was not his agent to pledge his credit for them. So in *Read* v. *Legard*, 6 Exch. 636, where a husband was made liable for necessaries supplied to his wife during the period of his lunacy, Baron *Alderson*, says: "If a wife is compelled by her husband's misconduct to procure necessaries for herself, as, for instance, if he drives her away from his house, or brings improper persons into it, so that no respectable woman could live there, then, according to the adjudged cases, he gives her authority to pledge his credit for her necessary maintenance elsewhere, which means that the law gives her authority by force of the relation of husband and wife." Baron *Martin* said that this is the true foundation of the liability, namely, that by contracting the relation of marriage, a husband takes upon himself the duty of supplying his wife with necessaries, and that if

he does not perform that duty, either through his own fault or in consequence of a misfortune of the kind in that case, the wife has, by reason of the relation, an authority to procure them herself, and that the husband is responsible for what is so supplied.

This doctrine is pretty satisfactory; but we should be quite as well satisfied to say that in such cases the law treats the husband just as though he had in fact given the wife authority; the same as in the case of an implied promise, where the law does not really go upon the ground of a promise, but treats the party just as though he had promised; and that is what is meant by an implied promise.

That a wife, wrongfully turned away by her husband without the means of supplying herself with necessaries, may pledge his credit for them, is undeniable. But the question we have to consider is, whether, when thus turned away, she can pledge her husband's credit for necessaries when she has an adequate income of her own with which she can supply herself.

The earliest case we have found on this question is *Warr* v. *Huntley*, 1 Salk. 118, which is this: An ordinary working man married a woman of like condition, and after cohabiting for some time the husband left her, and during his absence the wife worked, and this action being brought for her diet, it was held by Lord *Holt* that the money she earned should go to keep her. The principle of this case is recognized in *Johnston* v. *Sumner*, 3 H. & N. 261, though the case itself is not referred to. Pollock, C.B., there says: "If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity; for by law she has no property, and may not be able to earn her living: but we should hesitate to say, if a laboring man turned his wife away, she being capable of earning and earning as much as he did, or if a man turned his wife away, she having a settlement double his income in amount,—that in such cases the wife could bind the husband." But a precarious income is not enough. Thus, in *Thompson* v. *Hervey*, 4 Burr. 2177, the wife, who had been sent adrift, had a

pension of £300 a year from the Crown, granted to her in her own name, but determinable at the pleasure of the Crown; and it was held that she could pledge the husband's credit notwithstanding, for that the pension, being only a voluntary grace and bounty and only during the pleasure of the Crown, was not what any creditor of hers could be supposed to give her credit upon.

Liddlow v. *Wilmot*, 2 Stark. 86, is much relied upon by the defendant and strongly denied to be in point by the plaintiff. But we think it in point. The original cause of the separation, which took place thirty years before suit brought, did not appear, but a reason for its continuance did appear, for the defendant had long cohabited with another woman, by whom he had a daughter twenty-five years old, consequently the wife was necessarily away: and this is what is said of the case in *Johnston* v. *Sumner*. So it was not a case of separation by mutual consent, as clearly appears by what was said in summing up. The wife had adequate means of her own, but it does not appear whence she derived them, much less that she derived them from her husband by way of an allowance on separation, as is claimed in argument to be the fair inference from the facts stated. Nor is there anything to show that the wife had forfeited her conjugal rights. Lord *Ellenborough*, in summing up, said: "The first question for consideration is, whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him, for then he was bound by law to afford her means of support adequate to her situation; but if either from her husband or from other sources she was possessed of such means, the law gives no remedy against the husband, but the idea of an implied credit is repelled." And this is undoubtedly the law of England. *Blackburn*, J., in *Bazeley* v. *Forder*, 9 B & S. 599, puts it thus: "A wife when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his

credit for her reasonable expenses according to her husband's degree, *unless she is in some other way supplied* with the means of providing them." In this connection it is worthy of remark, if the husband's liability when he turns his wife away is put upon the ground of agency arising from necessity, as many of the cases do put it—*Eastland* v. *Burchell*, L.R. 3 Q. B. D. 432—it logically follows that when there is no necessity there can be no agency, for *cessante ratione legis cessat ipsa lex*; and there can be no necessity when the wife has means of her own with which she can supply herself.

Clifford v. *Laton*, 3 C. & P. 15, is understood by some to be to the same effect as *Liddlow* v. *Wilmot*. Mr. Smith so regards it in his 2 Lead. Cas. 438. It is so digested in 4 Jacob's Fisher's Dig. pl. 6041. And in *Johnston* v. *Sumner*, *Pollock*, C. B., cites it in connection with *Liddlow* v. *Wilmot*, and to the same proposition. And it is quite susceptible of the construction they give it, although it must be admitted that as the case is reported in Carrington & Payne, that point does not very clearly appear.

In *Litson* v. *Brown*, 26 Ind. 489, it is held that if a wife, living apart from her husband for just cause, has means of her own with which she can support herself, however derived, no necessity exists for others to supply her, and that the husband cannot be made liable except on an express promise to pay. Mr. Schouler, in his work on Husband and Wife, s. 117, seems to recognize this case as law, for he cites it in support of the proposition that when a husband by his misconduct compels his wife to live apart from him, he is liable for her necessaries notwithstanding his allowance, as long as that allowance is insufficient *and she has no proper means of support.* And we do not think that he elsewhere in his work controverts this doctrine. True, he says that ante-nuptial settlements cannot vary the terms of the conjugal relation, nor add to nor take from the personal rights and duties of the husband and wife. But he is speaking generally, and without reference to the question we are considering;

and what he says is true as a general proposition, both in England and in this country. Indeed we find little or no authority in this country opposed to the view here taken of this question.

But in cases like the one before us, it is for the jury to say whether the wife has adequate means or not for her support.

As to the defendant's liability for the support of his child, it does not appear why the child is with the mother, whether with defendant's consent and approval or against his will and wishes. It may be with her in a way to charge the defendant for its support; but whether it is or not we cannot determine on this record. As to the law of the subject, see *Rawlyns* v. *Vandyke*, 3 Esp. 250; *Bazeley* v. *Forder*, 9 B. & S. 599; *Gill* v. *Read*, 5 R. I. 343; (73 Am. Dec. 73); *Reynolds* v. *Sweetser*, 15 Gray 78. The case of *Gordon* v. *Potter*, 17 Vt. 348, which holds that a father is not liable for necessaries furnished to his minor child except upon his promise, express or implied, to pay for them, is not opposed to these cases, for they also go upon the ground of an implied promise.

Judgment reversed and cause remanded.

Munson, J., dissents.

WILLIAM GOOD *v.* THOMAS KNOX AND GEO. K. EATON.

Impeachment of adversary called as witness. Harmless error. Instruction upon issue not raised. Agency.

1. A party calling his adversary as a witness to fix a several liability upon his co-defendant, cannot impeach him by showing former contradictory statements, however it may be when the witness is called to fix liability upon himself.
2. Where an issue has been found in favor of an excepting party, no reversable error can be predicated in respect of that issue.
3. The trial court is not bound to instruct the jury in a given particular, even though that instruction be a correct exposition of the law, unless the evidence in the case requires it.
4. *Held*, that there was nothing in this case calling for an instruction that defendant Eaton might be liable by reason of having held Knox out to the world as his accredited agent.

Assumpsit. Plea the general issue. Trial by jury at the December term, 1890, Caledonia county, Tyler, J., presiding. Verdict against the defendant Knox for $289.94, and for the defendant Eaton to recover his costs. The plaintiff excepts.

The plaintiff claimed to recover a balance due for work done on a farm in Kirby. It was conceded that there was a balance due the plaintiff of $266 and interest. The defendant Eaton contended that he was not liable to the plaintiff for the reason that he had never employed him to render the services sued for.

Eaton held the title to the farm on which the work was done. Knox was his uncle; and the claim of Eaton was that he permitted his uncle to live there, but assumed no responsibility as to the expenses of carrying it on.

The plaintiff was originally hired by Knox, and did not claim any personal contract with Eaton, but insisted that the relation of Eaton to the property was such that he was liable. His evidence tended to show that Eaton furnished all the stock on the farm, gave directions as to its management, once received some oats raised on it, and that "Knox occupied and run this farm as a sort of agent of Eaton, but had a kind of interest in it." What that interest was did not appear except as above stated.

In the opening the plaintiff called Knox as a witness to the point that he was the agent of Eaton. This he denied, and thereupon the plaintiff proposed to show that the witness had formerly said that he was such agent. The court excluded the testimony and the plaintiff excepted.

The defendant Knox denied that he had paid the plaintiff the amount of his debt in certain wood. Upon this issue the plaintiff offered to show that the wood in question was cut upon the Hall lot, and that one Harris had a lien upon it for its full value, and that this was known to the plaintiff when it was alleged that he agreed to take the wood in payment. The evidence was excluded and the plaintiff excepted.

The evidence tended to show that if the plaintiff ever agreed to accept the wood in payment it was upon condition that Knox should furnish a team with which to haul it, and that this had never been done. The plaintiff requested the court to instruct the jury that if the defendants had agreed and afterwards neglected to furnish a team, the $266 would thereupon become payable in money.

The plaintiff further requested the court to charge that upon the undisputed evidence the wood belonged to Harris; and that the defendant Eaton might be liable if he held Knox out to the world as his accredited agent, and this was known to the plaintiff. The court refused to charge as above requested, and the plaintiff excepted.

Bates & May, for the plaintiff.

The plaintiff should have been allowed to show contradictory statements made by Knox, for he was a party defendant. *Batchelder* v. *Kinney*, 44 Vt. 150; *Fairchild* v. *Bascom*, 35 Vt. 398; *Stevens* v. *Beach*, 12 Vt. 585.

Harry Blodgett, *C. A. Prouty* and *Ide & Quimby*, for the defendant Eaton.

What Knox had said on former occasions was properly excluded. He was the plaintiff's witness, and the plaintiff could not impeach him in that manner. *Cox* v. *Eayres*, 55 Vt. 24.

The jury found that the plaintiff did not agree to take his pay in wood. That issue having been found in favor of the plaintiff, he was not harmed by any error during the trial in reference to it. *Sanborn* v. *Cole*, 63 Vt. 592; *Currier* v. *Robinson's Est.*, 61 Vt. 196; *Sampson* v. *Warner*, 48 Vt. 257.

There is nothing in the exceptions to show that the charge as given did not fully cover the question of agency. Error will not be presumed. *Tenney* v. *Smith & Harvey*, 63 Vt. 520.

The opinion of the court was delivered by

ROWELL, J. The statute provides that a party to a civil action may compel an adverse party to testify in his behalf in the same manner and subject to the same rules as other witnesses; but that the party so called to testify may be examined by the opposite party under the rules applicable to the cross-examination of witnesses. R. L. 1089. Whatever right the party thus calling his adversary may have to impeach him when he is called to fix liability on himself, either joint or several, we think where he is called to fix liability on his co-defendant and not on himself, that in respect of impeachment he must be treated like other witnesses, or, in the words of the statute, "in the same manner and subject to the same rules as other witnesses." Hence there was no error in excluding inquiry of the defendant Knox as to claimed former contradictory statements by him.

The issue, whether plaintiff had been paid in wood, as defendants claimed, was found in plaintiff's favor; therefore the exclusion of his offer to show that Harris owned the wood and that he knew it, as tending to show that he did not take it in payment as claimed, worked no harm, neither on this score nor on the score of discrediting the witnesses who testified that he did thus take it; for the jury found the testimony of the witnesses untrue on that point, and they were at liberty on that finding to discredit them on other points, if they thought it did discredit them.

For the same reason the ownership of the wood became immaterial, as did also the legal effect of defendants' refusal to furnish plaintiff a team to draw it.

The record contains nothing to show that plaintiff's contract of service was made with Knox in the belief that he was Eaton's agent in the transaction, induced by a known holding of him out by Eaton as his agent in respect of carrying on the farm; but as appears by the exceptions and the charge, plaintiff put his case as against Eaton on the ground of a general agency in Knox in respect of carrying on the farm, broad enough to confer authority on him to hire help thereon on Eaton's account. Therefore the case did not present an aspect of agency by holding out and accrediting as such to plaintiff's knowledge and belief, and so it was not error to refuse to put it to the jury in that aspect.

Judgment affirmed.

STATE *v.* HIAL MATHERS.

Evidence. Letter from husband to wife admissible against husband.

1. Writings offered as evidence will not be excluded because they were improperly obtained.
2. The respondent wrote a criminatory letter to his wife and intrusted it to his daughter for delivery. It was taken from her pocket and offered in evidence. *Held*, admissible.

Indictment for an assault with intent to commit rape. Trial by jury at the December term, 1890, Bennington county, Taft, J., presiding. Verdict, guilty. The respondent excepted. The case appears in the opinion.

W. B. Sheldon, for the respondent.

Husband and wife are excluded from the privillege of testifying for or against each other as a matter of public policy. 1 Phil. Ev. 78; 1 Best Ev. s. 175; *Stein* v. *Bowman*, 13 Pet. 223, *Barker* v. *Dixie*, Cas. temp. Hardw. 264; *Bently* v. *Cook*, 3 Doug. 422. 2 Kent. Com. 179, 180; *Com.* v. *Marsh*, 10 Pick. 57; *Robins* v. *King*, 2 Leigh, 142, 144; *Snyder* v. *Snyder*, 6 Binn. 488; *Corse* v. *Patterson*, 6 Hur. & J. 153; *Barbat* v. *Allen*, 7 Exch. 609.

For the same reason communications between husband and wife are privileged. 1 Greenl. Ev. s. 254; 2 Best Ev., 975, s. 586; *Goodright & Stevens* v. *Moss*, Cowp. 594; *Anderson* v. *Anderson*, 9 Kans. 112; 3 Crim. Law Mag. 154-173; 2 Steph.; Nisi Prius, 1758-1763; *Regina* v. *Pamenter*, 12 Cox's Crim. Cas. 177; *Bowman* v. *Patrick*, 32 Fed. Rep. 368; 2 Smith's Lead. Cas. 6. 105; *Hick's Est.* v. *Blanchard*, 60 Vt. 677; *Regina* v.

Pamenter, supra; Bobo v. *Bryson*, 21 Ark. 387; *Wilson* v. *Troup*, 7 Johns. 25; *U. S.* v. *Six Lots of Ground*, 1 Woods, 234; *Dreier* v. *Conn. Life Ins. Co.*, 24 Fed. Rep. 670; *People* v. *Atkinson*, 40 Cal. 284; *Commonwealth* v. *Moyer*, 15 Phil. 397; *Hemenway* v. *Smith*, 28 Vt. 707.

C. H. Mason, State's Attorney, for the State.

Communications between husband and wife that are overheard by, or fall into the hands of third persons, are not privileged. *State* v. *Center*, 35 Vt. 378; *Commonwealth* v. *Griffin*, 110 Mass. 181.

Nor in this case is it material how the letter was obtained. 1 Greenl. Ev. s. 254.

The opinion of the court was delivered by

ROWELL, J. The prisoner, being in jail on a charge of assault and battery with intent to commit rape, wrote a criminatory letter to his wife, intended for her alone, and gave it unsealed to one of his daughters to hand to her; but before delivery it was taken from that daughter's pocket by another daughter, and produced at the trial by the prosecution and offered in evidence. The prisoner objected to its admission, for that it was a confidential communication and therefore privileged. But it was admitted, to which he excepted.

Conceding, without deciding, that the letter was a privileged communication in the hands of the daughter to whom it was given, and conceding that it would have been a privileged communication in the hands of the wife, yet this was not a reason for excluding it, coming into the possession of the prosecution as it did. When papers are offered in evidence, the court can take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try that question. 1 Greenl. Ev. s. 254a; 1 Whart. Ev. s. 586. Thus, in *Jordon* v. *Lewis*, H. 13 Geo. 2, B. R., reported

in note to *Legatt* v. *Tollervey*, 14 East, 302, a copy of an indictment obtained without authority was held not to be inadmissible for that reason; and *Lee*, C. J., said that the court could not notice the manner in which it was obtained. This case was followed in *Legatt* v. *Tollervey*, and a record of the Quarter Sessions, produced without authority, held admissible notwithstanding. These cases were approved and followed in *Commonwealth* v. *Dana*, 2 Met. 329, 337.

In *Lloyd* v. *Mostyn*, 10 M. & W. 478, the bond in suit was in possession of W., who held it as the representative of a former attorney of the obligors, and was himself the defendant's general attorney, though not his attorney of record in the action, and who had undertaken to produce the bond at the trial if the judge should think he was bound to do so. Before the assizes the bond had been sent by W. to the defendant's attorney in the action, in London, for the purpose of inspection and admission under a judge's order, and the plaintiff's attorney had there taken a correct copy of it. At the trial W. had the bond in court, but objected to produce it on the ground of privilege, and the objection was allowed. The plaintiff then tendered in evidence said copy of the bond. The defendant objected that the bond having been in the confidential custody of W., a copy so obtained could not be used in evidence; and *Fisher* v. *Heming*, 1 Phil. Ev. 147, was relied upon as authority. But Baron *Parke* said he had always doubted that case, and Lord *Abinger* said it was impossible to say that the copy was not evidence.

In *State* v. *Buffington*, 20 Kan. 599 (27 Am. Rep. 193), a letter, written by the defendant to his wife and sent to her by mail, was taken from the post-office by the prosecuting witness and handed to the wife, who read it and handed it back to the witness, who furnished it to the prosecuting officer to be read in evidence. There was no testimony tending to show that when offered in evidence it was in the custody or control of any one except the witness and the prosecuting attorney. Its admission

was objected to on the ground of privilege, but the court held it admissible by reason of the circumstances in which it was produced.

Exceptions not sustained and judgment on verdict.

W. A. PAINE v. HAMILTON WEBSTER.

Waiver of exception by putting in further evidence; by not urging same before Supreme Court.

1. Where a party, after having excepted to the action of the court in overruling his motion for a verdict upon the evidence, puts in further testimony, he thereby waives the exception.

2. Exceptions taken on the trial below but not urged by the exceptant in this court, were not considered.

Assumpsit. Plea, the general issue. Trial by jury at the September term, Washington county, 1890, Munson, J., presiding. Verdict and judgment for the defendant. The plaintiff excepts.

W. A. & O. B. Boyce, for the plaintiff.

F. L. Laird, for the defendant.

By putting in further evidence the plaintiff waived his exception to the refusal of the court to direct a verdict. *Latremouille, Admr.*, v. *Bennington & Rutland Ry. Co.*, 63 Vt. 336.

The opinion of the Court was delivered by

ROWELL, J. This is assumpsit on an acceptance. Plaintiff produced the draft, proved the acceptance and demand and notice, and rested.

Defendant offered to show fraud and want of consideration, claiming that on such showing the plaintiff would have to show that he was an innocent purchaser for value. The testimony was admitted, to which plaintiff excepted.

At the close of defendant's testimony, plaintiff moved for a verdict in his favor, for that the defendant had not established

fraud nor want of consideration nor connected the plaintiff with any of the proceedings of the drawers, which motion was overruled and plaintiff excepted. After this further testimony was introduced by both parties.

By putting in further testimony, plaintiff waived his exception to the overruling of his motion. *Latremouille* v. *Bennington & Rutland Railway Co.*, 63 Vt. 336.

No point is made in plaintiff's brief on the admission of evidence to show fraud and want of consideration, nor as to the admission of certain letters, postal-cards, telegrams, and other written or printed instruments relating to defendant's dealings with the drawers, to the admission of which plaintiff excepted, hence we have no occasion to consider those questions.

Judgment affirmed.

WORTHINGTON *v.* CENTRAL VT. R.R. CO.

Negligence, when question of law. Being upon the platform of moving car, when negligence. Practice. Submitting issue not made by evidence.

1. Negligence is ordinarily a mixed question of law and fact; but when the facts are not in dispute and only one inference can be drawn from those facts by a reasonable man, it becomes purely a question of law.

2. For a passenger to be upon the platform of a rapidly moving steam-car is, as matter of law, *prima facie* negligence, and no recovery can be had for an injury which was contributed to by the fact of his being in that position, unless his presence there was excused by the occasion.

3. That all the seats in the car are occupied, and the aisles crowded to that extent that the position of the passenger, standing in the aisle, is one of "positive discomfort to himself and evident annoyance to others," does not excuse a passenger from going upon the platform voluntarily and remaining there while the train is in rapid motion.

4. The supreme court in reversing a case for that the trial court ought, upon the evidence, to have directed a verdict for the defendant, will remand it for a new trial.

5. It is error to submit an issue to the jury which there is no evidence tending to maintain.

This was an action on the case for the negligence of the defendant. Plea, the general issue. Trial by jury at the March term, 1890, Rutland county, Munson, J., presiding. Verdict and judgment for the plaintiff. Exceptions by the defendant.

The plaintiff was injured by falling from the platform of one of the defendant's cars while the train was in motion. The train was an excursion train which had left Rutland on the morning of the accident, and was to run to Burlington. The accident

occurred a few miles beyond Middlebury. The day was pleasant and the excursion was unusually large. The plaintiff took the train at Rutland, where there was ample room, and where he obtained a seat with his wife and family. This seat he continued to occupy until after the train left Middlebury. At the intervening stations between Rutland and Middlebury, the cars filled up so that on leaving Middlebury they were badly overloaded. The evidence of the plaintiff tended to show that the seats in all the cars were occupied, and that many people were standing upon the platforms and in the aisles. After the train left Middlebury, the plaintiff gave his seat to a lady who was standing beside him in the aisle and stood up in her place. After standing there for a few moments, he went out and took his stand upon the forward platform of the car next behind the one in which he had been riding, standing either upon the platform or upon the step, he did not clearly remember which, with his back towards the car, and holding on by the iron rod behind him. While in this position he was either thrown or fell from the car. Both the platforms were filled with people, no one of whom saw him when he began to fall, and only one of whom saw him after he was free from the car. No one else was injured during the trip. The plaintiff could not remember how he happened to fall.

With reference to how he happened to be upon the platform, the plaintiff testified that the car in which he was riding was crowded, that the seats were all full, that the aisle was full, and that some persons were standing upon the platform. After giving his seat to the lady he stood for a few moments in the aisle, but the motion of the train was such that he was thrown and jostled against other persons standing near him in the aisle, most of whom were ladies, to such an extent as to render his position there one of discomfort to himself and evident annoyance to others. Thereupon it occurred to him that he would go into the smoking-car and endeavor to obtain a seat there. For this purpose he left the place where he was standing, passed out upon

and across the rear platform of that car and on to the forward platform of the next car. Arriving there the car was so crowded that it became evident to him that it would do no good to go any further, and he accordingly took up the position which he was occupying when injured, thinking that he would remain there for a short time and then return to his former position inside the car.

The defendant claimed that by the plaintiff's own testimony he had voluntarily left his position in the car and gone out and remained upon the platform without any sufficient excuse, and for that reason moved the court to direct a verdict in its favor. This the court declined to do, and the defendant excepted.

The defendant requested the court to instruct the jury that if the plaintiff having standing room inside the car, voluntarily went upon the platform and remained there, and was subsequently injured by reason of being there, he could not recover. This the court declined to do, but did instruct the jury upon that branch of the case as follows:

"The claim is that the passages of the different cars were entirely filled, and that the platforms of the cars were also filled, women as well as men standing upon them. The plaintiff claims that the passage where he stood after giving up his seat was crowded, and that most of those in his vicinity were ladies; that the swaying and jolting of the train was such that his position was one of discomfort to himself and of evident annoyance and discomfort to others; and that in consequence of this he concluded to go to the smoking-car.

"If the position of the plaintiff while standing in the passageway, after giving up his seat, was one of real and positive discomfort, you are not precluded from finding that he was justified in going out upon the platform with a view to reaching the smoker, if he could do so without running greater risk than a man of ordinary prudence would have taken under like circumstances. If after getting upon the platform he found the opposite platform so crowded that it was impracticable to get into the next car, and the situation was such that he could not return to and occupy the place he had left without real and positive dis-

comfort, you are not precluded from finding that he was justified in remaining upon the platform, if he could do so without running greater risk than a man of ordinary prudence would have taken under like circumstances.

"Ordinarily a person who went upon the platform to stand, or who undertook to pass from car to car while the train was in motion, could not recover. But in view of the crowded condition of this train, the shifting movement and varying pressure incident to such a crowd, and the necessity of the platform's being occupied by some part of the passengers, we do not hold that it was necessarily negligent for the plaintiff to be upon the platform. It is left for you to determine whether there was negligence on the part of the plaintiff in going to and standing upon the platform under the circumstances shown.

"But if the plaintiff, after giving up his seat and standing a while in the passage, went out upon the platform without any reasonable ground for so doing, as tested by the rule just stated, but merely because he preferred to ride upon the platform rather than stand in the passage inside, he was guilty of contributory negligence, and cannot recover."

The defendant excepted to the refusal of the court to charge as requested and to the charge as above given.

It appeared that the train was equipped with the automatic air-brake, and there was no evidence tending to show that the brake did not work properly, nor that the train was not properly operated, save that the speed was too high. The plaintiff did not claim in his declaration nor in the opening of his case, that there was any deficiency in the number of brakemen, nor that if there was, this fact did nor could have contributed to his injury. The defendant introduced the conductor as a witness, and upon his cross-examination it came out that he had only two brakemen with him. In the argument the plaintiff claimed that this was gross negligence, and requested the court to instruct the jury upon that point, and the court did submit that question to the jury in the following language:

"It was the duty of the company to send with this train enough men for the proper control and management of the train, in view of the number of cars it contained and the load it was expected to carry. In considering the question whether the de-

fendant was negligent in the operation of this train, you may take into account the crowded condition of the cars, the fact that the platforms were filled, the number of men provided, and their general conduct in the management of the train."

To this the defendant excepted. No exception was taken to the argument, and no question made upon the pleadings; and the defendant as well as the plaintiff discussed this point to the jury.

C. A. Prouty, for the defendant.

To be upon the platform of a moving car is, as a matter of law, negligence, and a plaintiff injured by reason of being there cannot recover, unless properly there; and he cannot properly be there, save as a matter of necessity. *Taylor* v. *Danville, etc., Rd. Co.*, 10 Brad. (Ill.) 311; *Secor* v. *T. P. W. Ry. Co.*, 10 Fed. Rep.; *Hickey* v. *Boston & Lowell Rd. Co.*, 14 Allen 419; 2 Wood's Ry. Law, 308; *Quinn* v. *Illinois Central Rd. Co.*, 51 Ill. 495; *Chicago N. W. Rd. Co.* v. *Carroll*, 5 Brad. (Ill.) 201; *Camden & Atlantic Rd. Co.* v. *Hoosey*, 99 Penn. St. 492.

There was no evidence in this case which fairly tended to show that the plaintiff was *necessarily* upon the platform, and it appears that his injury was occasioned by reason of his having been there. Hence the court should have directed a verdict for the defendant. Pat. Ry. Ac. Law 448; *Jackson* v. *Metropolitan Ry.*, 3 App. Cas. 193; *Toomey* v. *L. B. & S. C. Ry.*, 91 E. C. L. 149; *Pleasants* v. *Fant*, 22 Wall. 121; *Herbert* v. *Butler*, 97 U. S. 319; *Randall* v. *B. & O. Rd. Co.*, 109 U. S. 478; *Adams Ex. Co.* v. *Sharpliss*, 77 Penn. St. 522; *Camden & Atlantic Rd. Co.* v. *Hoosey*, 99 Penn. St. 434.

The evidence in the case did not tend to show, that the injury of the plaintiff was in any way occasioned, or contributed to, by the fact that there were only two brakemen upon the train. It was therefore error for the court to submit that issue to the jury. *Mack* v. *Snider*, 1 Aik. 104; *Barron* v. *Fay*, 38

Vt. 705; *Black* v. *Brooklyn City Ry. Co.*, 108 N. Y. 640; 15 N. E. Rep. 389; *Waddingham* v. *Hulett*, (Mo.) 5 S. W. Rep. 505; *Gulf C. & S. F. Rd. Co.* v. *Blohn*, 73 Texas, 637.

Geo. E. Lawrence, for the plaintiff.

The question of negligence is for the jury, even when the facts are undisputed. *Fassett* v. *Roxbury*, 55 Vt. 555.

The evidence of the plaintiff tended to show that the defendant was negligent in running its train at a high rate of speed, and in overcrowding its cars, and these issues were properly submitted to the jury. *Taylor* v. *Day*, 16 Vt. 566; *Vinter* v. *Schwab*, 32 Vt. 612; *Barber* v. *Essex*, 27 Vt. 62; *Hill* v. *New Haven*, 37 Vt. 501; *Rogers* v. *Swanton*, 54 Vt. 585; *Fassett* v. *Roxbury*, 55 Vt. 552; *Stackers* v. *Ry. Co.*, 79 N. Y. 464; Beach Cont. Neg. 451; Sh. & R. Neg., ss. 54, 495 and cases there cited; Wood's Brown Carriers, s. 476, and cases cited; *Hadley* v. *Cross*, 34 Vt. 588; *Ry.* v. *Weans*, 8 A. & E. Ry. Ca. 399 and note; *Bemis* v. *Ry. Co.*, 42 Vt. 378; *L. & N. Ry. Co.* v. *Kelley*, 13 A. & E. Ry. 1; *T. C. Ry. Co.* v. *Higgs*, 34 A. & E. Ry. Ca. 529; *Cleveland etc., Ry.* v. *Newell*, 8 A. & E. Ry. Ca 377; *Louisville, etc., Ry.* v. *Jones*, 28 A. & E. Ry. Ca. 170; *T. & P. Ry. Co.* v. *Hamilton*, 26 A. & E. Ry. Ca. 182; *Central Ry.* v. *Sanders*, 27 A. & E. Ry. Ca. 300; *Frick* v. *Ry. Co.* 8 A. & E. Ry. Ca. 290; *Nutter* v. *Boston & Maine*, 60 N. H. 483.

The fact that the plaintiff was upon the platform, does not bar his recovery if he was properly there. In this case his presence there was excused by the overcrowded condition of the cars. *Willis* v. *Ry. Co.*, 34 N. Y., 670; *Werle* v. *Long Island Ry. Co.*, 98 N. Y. 650; *Dewire* v. *Ry. Co.*, 148 Mass. 343; *Treat* v. *B & L. Ry. Co.*, 131 Mass. 371; *Zemp* v. *Wilmington, etc., Ry. Co.*, 9 Rich. 84; *Gerstle* v. *U. P. Ry. Co.*, 23 Mo. App. 361; *L. & N. Ry. Co.* v. *Kelley*, 13 A. & E. Ry. Ca. 1.

The defendant was bound to take notice of the fact that the plaintiff was upon the platform, and to moderate the speed of

its train accordingly. If it did not do so, its negligence was subsequent to the negligence of the plaintiff, and the plaintiff may recover, even though his previous negligence contributed to the injury. *Davies* v. *Mann*, 10 M. & W., 546; *Trow* v. *Vt. Cent. Rd. Co.*, 24 Vt. 495; *Colchester* v. *Brooke*, 53 E. C. L. 376; S. C., 1 Smith's Lead Ca. 312; *Hays* v. *St. Qy. Co.*, 34 A. & E. Ry. Ca. 97; *Kelley* v. *Union Co.*, 35 A. & E. Ry. Ca. 366; *Williams No. Pac. Ry. Co.*, 11 A. & E. Ry. Ca. 421; *Kean* v. *Baltimore Ry.*, 19 A. & E. Ry. Ca. 321; *Sweigert* v. *Ry. Co.*, 9 A. & E. Ry. Ca. 322; *Beems* v. *Chicago, etc., Ry.*, 6 A. & E. Ry. Ca. 222; *Romick* v. *Ry. Co.*, 15 A. & E. Ry. Ca. 288; *Maryland, etc., Ry. Co.* v. *Newbern*, 19 A. & E. Ry. Ca. 266, and numerous cases there cited.

The defendant discussed to the jury the issue as to whether there were sufficient brakemen upon the train, and cannot now object to the instruction of the court upon that point. *Rollins* v. *Chalmers*, 51 Vt. 592; *Paige* v. *Smith*, 13 Vt. 251; *Porter* v. *Gile*, 44 Vt. 520.

The opinion of the court was delivered by

ROWELL, J. If, as matter of law, it was *prima facie* negligence for the plaintiff to be riding on the platform or the steps, as shown by the case, and if his riding there contributed to his injury, then the burden was on him to show that he was riding there for a reason that freed him from the imputation of negligence; and if the testimony did not tend to show such reason, he had no case for the jury, and the court should have directed a verdict against him.

It is sometimes said that when the facts are conceded or undisputed, the question of negligence is for the court and not for the jury. But this must not be taken in its broadest sense and as universally true, but with limitation. When the law prescribes what shall constitute negligence, or when the act relied

upon to show negligence is isolated, then negligence becomes a question of law.

But when the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it—no room for opposing inferences. This is clearly shown by the adjudged cases.

Thus, in *Briggs* v. *Taylor*, 28 Vt. 180, it was regarded as so certain that carriages and sleds would be injured by standing out doors all winter, that the court ruled as matter of law that thus leaving them was negligence. But in *Vinton* v. *Schwab*, 32 Vt. 612, it is said, that although there is no conflict in the testimony in respect of negligence, yet, if it still rests upon discretion, judgment, and experience, it is matter of law and not of fact. And in *Whitcomb* v. *Denio*, 52 Vt. 382, it is said that whatever the rule may be in other States when the facts are undisputed, in this State, when the question is whether a thing has been done within a reasonable time or with reasonable care, or when any other fact is to be determined that involves the judgment of the trier upon an existing state of facts and circumstances, the almost universal practice has been to submit the question to the jury.

In *Hunter* v. *Cooperstown &c. R. R. Co.*, 112 N. Y. 371, it was held that the plaintiff, who was *sui juris* and in the full possession of his faculties, with nothing to disturb his judgment, was guilty of negligence as matter of law in attempting to board a railroad train moving at the rate of from four to six miles an hour, and that the question did not become one of fact by the conductor's calling out to him to get on. That it was a dangerous and hazardous attempt, the court said must be the judgment of all men ; that persons are taught from their earliest youth the great danger attending an attempt to board or to leave a train while in motion; and that there is no person of mature years and judgment but has the knowledge that such an attempt is

dangerous in the highest degree. But the court said that there may be cases in which such an attempt would not be regarded as negligence as matter of law, and where the question of negligence upon all the facts in the case should be submitted to the jury, and referred to *Filer* v. *New York Central R. R. Co.*, 49 N. Y. 47, as such a case.

In *Solomon* v. *Manhattan R. R. Co.*, 103 N. Y. 437, it is said that the rule established by the decisions is, that it is presumptively a negligent act for a passenger to attempt to alight from a moving train, and that it is not sufficient to rebut the presumption that the trainmen acquiesced in the action of the passenger, nor that the company violated its duty or contract in not stopping the train, nor that to remain on the train would subject the passenger to trouble or inconvenience, but that to excuse such an act and free the passenger from the charge of contributory negligence, there must be a coercion of circumstances that did not leave the passenger in the free and untrammeled possession of his faculties and judgment. And the court went on to say, that although negligence is usually a fact for the jury, yet that the inference of negligence in a given case may be so strong and convincing that the judge may direct a verdict; that the conclusion that it is *prima facie* dangerous to alight from a moving train is founded on our general knowledge and common experience, and that it is akin to the conclusion now generally accepted, that it is in law a dangerous and therefore a negligent act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains.

In *Morrison* v. *Erie Railway Co.*, 56 N. Y. 302, it was held that the question whether a person has been guilty of contributory negligence in attempting to alight from a car in motion is not in every case a question of fact for the jury; that when the facts are undisputed, the question of contributory negligence may become a question of law; and it was held to be such in that case.

Bolger, *J.*, in delivering the opinion of the court, said: "Can it be said that a person of ordinary care and prudence would have swung himself from a car in motion down to the ground in the dark, ladened with the weight of a child twelve years old, having but one hand and one arm to aid himself with, when there was no other danger to be avoided by meeting this, and no incentive to the act other than the inconvenience of being carried by his place of abode, and with a full apprehension of the danger he was about to incur? I think not, and am of the opinion that it is so clear, that the law and this court should have answered without calling in the aid of the jury."

Gavett v. *Manchester & Lawerence R. R. Co.*, 16 Gray, 501, is to the same effect. There it appeared that after the train started and was in motion, the plaintiff either passed out of the door and was on the platform of the car for the purpose of attempting to leave it or was actually stepping from the platform of the car upon that in front of the station. While thus situated she was thrown from the car and injured. The court said that it could not be doubted that the well-known hazards of traveling on railroads and the unprotected and exposed situation of persons standing on the platform of a car or attempting to leave it when the train is about to start or is actually in motion, render it unsafe for passengers to place themselves in such a position, and preclude the idea that due care can be exercised under such circumstances.

So, riding with an arm projecting out of the car window, whereby it is injured, is negligence *per se*, and precludes recovery. *Todd* v. *Old Colony &c. R. R. Co.*, 3 Allen, 18; 80 Am. Dec. 49.

In *Indianapolis &c. R. R. Co.* v. *Watson*, 114 Ind. 20; 5 Am. St. Rep., at page 591, it is said that if from the facts only one inference can be drawn, and that is that there was negligence, it must be adjudged as matter of law; or conversely, if it can be clearly affirmed as matter of law that there was no negligence

the court must so declare. In *Seefeld* v. *Chicago &c. R. R. Co.* 70 Wis. 216, (5 Am. St. Rep. 168,) it is held that when the facts are undisputed and admit of no doubtful nor opposing inferences, the question of negligence is one of law.

Many other cases of like import might be cited, but these are quite sufficient to establish the proposition above laid down, namely, that when the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt—no room for opposing inferences.

This brings us to consider whether, as matter of law, it was *prima facie* negligence for the plaintiff to be riding on the platform or the step as shown by the case. He was standing either on the second step or on the edge of the platform, with his back to the saloon window, holding on to the iron on the end of the car. There were notices on the car doors, forbidding persons to stand on the platform. The platform was full, and two small boys stood on the steps below him. The train was running at the rate of about thirty miles an hour at the lowest estimate; plaintiff's testimony tended to show that it was running much faster than that, and was swaying and jolting badly. There is nothing to show that the plaintiff was not an intelligent man, and in the full possession of his faculties. Add to this the well known fact that in this State railroads must be built with many and sharp curves, which cause fast-running trains to sway and lurch considerably, however good the track, thereby greatly increasing the danger to one riding on the platform or steps of being jolted and thrown off,—and can it be doubted that the position the plaintiff occupied was, in the circumstances, one of danger and hazard? We think not. And because it was one of danger and hazard, it was *prima facie* negligence for him to occupy it.

But the plaintiff claims that the cases, especially in New York, are to a different intent, and hold that it is not *prima facie* negligence to ride on the platform of steam cars, and, among others, refers to *Willis* v. *Long Island R. R. Co.* 34 N. Y. 670, and *Werle* v. *Same*, 98 N. Y. 650. But we hardly think it is the law of New York that in no circumstances is it *prima facie* negligence for a passenger to ride on the platform of steam cars. To be sure in those cases it was held not to be such negligence for the plaintiffs to ride on the platform in the circumstances disclosed. In Willis's case it was not necessary to say anything about it, for his position neither caused nor contributed to his injury. But still the court said it was not *prima facie* negligence for him to be riding on the platform. And in *Nolan* v. *Brooklyn City &c. R. R. Co.*, 87 N. Y. 63, it is said, *obiter*, that the rule is settled that it is not, even in the case of steam cars, negligence *per se* for a passenger to stand on the front platform of a moving car. In Werle's case the court said that while the evidence as to many of the facts was conflicting, it thought there was nothing proved from which the court had a right, as a question of law, to attribute contributory negligence to the deceased, and that the whole case presented simply questions of fact for the consideration of the jury. The fair inference from this is, that the court thought there might be a state of facts shown in such a case that would make the question of negligence one of law.

In *Graville* v. *Manhattan R. R. Co.* 105 N. Y. 525, it is said to be unsafe as matter of common knowledge for a passenger to ride on the platform of a running train, and in *Clark* v. *Eighth Avenue R. R. Co.* 36 N. Y. 135, it was held to be *prima facie* negligence for a passenger to ride on the steps of a horse car; and it was laid down as a principal of law, that when it appears that a passenger was riding upon a car in a place of danger, his negligence is *prima facie* proved, and that the onus is on him to rebut the presumption. In Nolan's case it is said, referring to the case

last cited, that riding on the steps of a horse car is a position palpably more dangerous than riding on the platform. But we submit that it is no more dangerous than riding on the platform of a steam car when the train is in rapid motion. And in *Connolly* v. *Knickerbocker Ice Co.* 114, N. Y. 104, it is said that the fact that a passenger on a horse car stands on the outer platform when there is opportunity to take a seat in the car, might, in an action against the railroad company to recover damages for its negligence, constitute a defence in ordinary circumstances. Hence we conclude that in some circumstances it might be held in New York that riding on the platform of steam cars was *prima facie* negligence. But if the law of that State is otherwise, we are not disposed to follow it.

In Massachusetts the law is, as a general proposition, that standing on the platform of steam cars when the train is in motion is *prima facie* negligence. In addition to Gavette's case, already referred to, we refer to *Hickey* v. *Boston & Lowell R. R. Co.* 14 Allen, 429. That was a much stronger case for recovery than the one at bar, and yet the defendant had judgment. There the deceased had been riding in the smoking-car, and just before it was uncoupled to let the rest of the train run slowly into the station, he left it and, with other passengers, stepped upon the platform of the passenger car in the rear of it, with the intention of riding to the station in that position. The passenger car was going about five miles an hour, and ran against the smoker, which had been thrown across the track by a misplaced rail and switch, whereby the deceased received injuries from which he died. The court said that if an injury happens while the passenger is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care; but that when the plaintiff's own evidence shows he had left the place assigned for passengers, and was occupying an exposed position, and that the injury was due in part to the fact of such position, he must necessarily fail un-

less he can also make it appear, upon some ground of necessity or propriety, that his being in that position was consistent with the exercise of proper care and caution on his part; and as the plaintiff in that case had no testimony tending to show proper care on the part of the intestate, a nonsuit was entered. Although the court does not say in so many words that the deceased was *prima facie* negligent as matter of law, yet that is precisely what the case comes to; and the fact that there was room inside does not touch that question, because the presumption of negligence arises from the position itself, as it is a dangerous position, and one not provided for passengers to occupy while the train is in motion. The necessity or propriety of his being there is an element that comes in later, and for the purpose of rebutting the presumption of negligence; but if it cannot be shown, the presumption remains and precludes recovery, if the negligence was contributory.

In *Treat* v. *Boston & Lowell R. R. Corp.* 131, *Mass.* 371, the plaintiff, on the whole case did not appear to be one who at his own risk had voluntarily assumed an exposed position not intended for passengers, and therefore the question of contributory negligence was properly left to the jury. *Zemp* v. *Wilmington & Manchester R. R. Co.*, 9 Rich. Law, 84, 64 Am. Dec. 763, referred to by plaintiff, is not authority for him. There the plaintiff was standing on the front platform of the rear passenger car at the time of the injury, which was occasioned by the overturning of the engine when the train was moving from five to eight miles an hour. The whole case depended upon whether the injury was attributable to plaintiff's want of care. The court said that plaintiff's position at the moment of the accident was wrong, but that the proximate cause of the injury was the overturning of the engine; that plaintiff's being on the platform did not necessarily subject him to injury in an overturn any more than if he had been in the car; but that if he had fallen off the platform when the train was in motion, then he would have been obliged

to bear his injury, for then his own act would have been as much the proximate cause as the defendant's negligence.

Camden & Atlantic R. R. Co. v. *Hoosey*, 99 Pa. St. 492, is much in point. There the plaintiff below was a passenger on an excursion train of many cars, which were overcrowded, and the plaintiff and many others were unable to find seats. After searching for a seat and finding none, plaintiff took a position quite near the edge of the rear platform of one of the cars, and stood with his back to the end window of the car, and rode there, the cars being in rapid motion, till he was jolted off and injured. The court said that he was not only in a position of known danger, but was there voluntarily and against the rules of the company; that having shown by his own testimony that at the critical juncture he was in a position where no one of ordinary prudence should have placed himself, it was incumbent on him to show that he was there from necessity and not from choice; that the dangerous position on the platform in which he voluntarily placed himself while the cars were in rapid motion, was undoubtedly the immediate cause of his being jolted off; that if there had been any testimony from which it could have been reasonably inferred that he was there from necessity and not from choice, it would have been a question for the jury; but that in the absence of such evidence it was error to leave it to the jury to determine whether he was or was not guilty of contributory negligence. The plaintiff was the only person on the train who was injured, and the court said that he ought to have submitted to the inconvenience of standing in the cars.

Thus it is seen that on the authorities it is clearly maintainable that riding on the platform of steam cars in the circumstances disclosed in the case in hand is *prima facie* negligence as matter of law.

The plaintiff was the only person on the train who was injured; and that the position in which he was riding materially contributed to his injury, is not, and cannot be, questioned.

It remains to consider whether the testimony tended to show that the plaintiff was riding on the platform or the step, whichever it was, for a reason that freed him from the imputation of negligence. His claim was, as shown by the charge and his testimony, that the passage where he stood after giving up his seat was crowded; that most of those in his vicinity were ladies; that the swaying and the jolting of the cars were such that his position was one of discomfort to himself and of evident discomfort and annoyance to others; and that in consequence of this he concluded to go to the smoking-car. He testified that after taking his position on the platform or the step, he thought he would stay there a few minutes and then go back into the car he had left.

Thus it appears that the plaintiff had standing room in the car, which he might have continued to occupy, but which he chose to leave in order to free himself from discomfort and annoyance, and that he remained on the platform or the step in order to obtain temporary relief from that discomfort, intending in a short time to resume his former position in the car, which he might have done.

But passengers, especially on excursion trains, must expect more or less discomfort, and must endure it, rather than assume positions of danger and hazard not provided for their occupancy, for the purpose of avoiding it. Necessity alone can warrant the assumption of such positions. If they are assumed as matter of choice, and they contribute to injury, there can be no recovery. But what would constitute necessity in such cases, it is not easy to say. It may, perhaps, be safely said in a case like this, when nothing is said nor done by those in charge of the train to control nor influence the conduct of the passenger, that the attendant circumstances must be such as not to leave the passenger free to choose—such as to coerce his action, and to compel him to assume the position as the best he could do at the time, acting as a careful and prudent man.

The testimony in this case did not tend to show any such coercion of circumstances—any such compulsion; and therefore the case is, that the plaintiff was riding as matter of choice and not of necessity, in a dangerous place not provided for the occupancy of passengers, which contributed to his injury; hence the court should have directed a verdict against him.

The record discloses another error. The court submitted to the jury as one element bearing on the question of defendant's negligence in operating the train, the fact that there were but two brakeman upon it, although there was nothing tending to show that the train was in any respect improperly operated for lack of brakemen. It is a familiar rule that it is not proper to submit to the jury an issue that the testimony does not raise. Their are no other points of exception that we deem it important to consider.

Judgment reversed and cause remanded.

TAFT, J., would render a final judgment for the defendant. But the rest of the court would remand, as the issues joined to the jury stand undisposed of on the record, and upon them the plaintiff has a right, and may desire, to introduce additional evidence, and we cannot say that no such evidence exists.

Start and Thompson JJ., did not sit, having been of counsel.

CARROLL S. PAGE, Surviving Partner, *v.* FRANK S. EDWARDS.

Evidence. Conditional sale. Waterwheel when chattel. Waiver of lien. Statute of limitations.

1. L. was the owner of a saw-mill and the plaintiff's firm furnished him money with which to operate it. L. bought the logs in the name of the plaintiff's firm, and the lumber was sold and the collections made by that firm. The plaintiff's firm also bought for and delivered to L. a waterwheel and other machinery which L. put into and used in connection with said mill. The plaintiff's desceased partner managed the business and there was no direct evidence to show the terms under which L. took and held this machinery. *Held*, that the fact that the plaintiff's firm charged L. with the purchase price upon its books and that L. credited the plaintiff's firm with the purchase upon his books tended to show a sale, and that the circumstances of the case, together with the plaintiff's evidence that his firm took special pains to keep title to all the property which they bought for L., warranted a finding by the referee that this was a conditional sale.

2. A waterwheel and shafting attached to a lumber mill in the usual manner retain their character as chattels in favor of a conditional vendor as against a prior mortgage.

3. And this is so although old machinery covered by the mortgage was taken out to make room for the new, and although the waterwheel could not be removed without destroying the penstock.

4. A conditional vendor does not waive his lien by taking a mortgage of the same and other property as "further security".

5. Nor is the foreclosure of a mortgage which secured that and other indebtedness a satisfaction of the lien where it appears that the proceeds of the foreclosure did not liquidate the entire indebtedness.

6. The statute of limitations does not run against a conditional vendor until there is an adverse possession by the vendee.

Trover for the conversion of a waterwheel and certain machinery. Heard upon the report of a referee at the April

term, 1891, Lamoille county, Start, J., presiding. Judgment for the plaintiff. The defendant excepts.

In 1879 one Lamplough gave the defendent a mortgage of a saw-mill. In 1886 the defendant foreclosed this mortgage and obtained a decree which became absolute December 11, 1887. The plaintiff and his deceased partner were made parties defendant to that suit. In 1886 the defendant took possession under his mortgage and afterwards continued in such possession.

When the defendant took possession the waterwheel and machinery sued for were attached to and being used in connection with said mill. The writ in this cause was served April 9, 1888. Before making service the officer demanded the property of the defendant, who refused to surrender it.

In reference to the circumstances under which this property was put into the mill, and the plaintiff's title thereto, the referee reported as follows:

"After the said Jonathan Lamplough made the purchase of said sawmill and other property, he entered into an arrangement with the firm of Page & Noyes, aforesaid, to stock his mill with logs. Said firm furnished money to buy the logs, the title remaining in said firm; and the said Lamplough purchased the logs in their name, sawed the lumber and delivered it to them; said firm kept an account of such transactions, charging him with the money advanced and giving him credit for the lumber received, it being understood that Lamplough was to have the benefit of the business, that is, all above advances and interest on the same, and one dollar a thousand on the lumber for selling, guaranteeing the sales and collections and to make the firm of Page & Noyes safe, the title to all logs and lumber purchased with their advances was to remain in the firm until said firm should be fully paid; this arrangement continued up to the time of the said Jonathan Lamplough's decease.

In the spring of 1881 the said Lamplough was desirous of improving his saw mill. His waterwheel was old and he wanted one that would give him more power, and if this change was made it would require new shafting, gearing, pulleys, boxes, belts and other things to put the mill in good running order. He applied to the firm of Page & Noyes for advances for this purpose. Said firm supplied such things as he requested, pur-

chasing the same in its own name and paying for the same, and sent such items to the said Lamplough, who put the same into his saw-mill after removing such machinery as he desired and making suitable changes to adapt the mill to the new parts. It did not appear what Lamplough did with the old waterwheel and machinery removed from the mill. The amount of such advances or items was $670.23.

From the course of business between these parties, the pecuniary responsibility of said Lamplough at the time and the way and manner the items mentioned in said four bills were purchased, the referee finds that it was understood when said property was delivered to said Lamplough by the firm of Page & Noyes, that so far as it could lawfully be done, the property mentioned in said four bills was still the property of the firm of Page & Noyes, that said Lamplough was to take it and use it in the way and manner he did, and said firm would let him have it when he could pay for it; to further secure the firm of Page & Noyes against loss, on the the 30th day of July, A. D. 1881, the said Jonathan Lamplough and his wife, Andelucia A. Lamplough, executed the said firm a mortgage deed, covering all the property before mentioned in their mortgage deed to the defendant. Also one other hundred acre lot of land situated in what was formerly Sterling, and all the machinery in the saw-mill described in said mortgage deed as follows: "Also, all the machinery of every kind and description in the saw-mill aforesaid, consisting of a Leffel water-wheel, a Lane board mill, gearing, shafting, belting, fixtures and machines and machinery of every kind in or about said mill and all the privileges thereto." The condition in said mortgage deed was as follows: "Provided, however, and the condition of this deed is such, that if we shall well and truly pay or cause to be paid to the said Page & Noyes the sum of about fourteen hundred dollars, which the said Jonathan Lamplough owes the said Page & Noyes on book and all sums which he may hereafter owe the said Page & Noyes either on book or note or in any other manner, then this deed shall be void, otherwise of full force and virtue."

"The amount of the four bills hereinbefore referred to were entered on the books of Page & Noyes to the debit of Lamplough, in the same manner and in the same account as the cash advanced with which to purchase logs. Lamplough also kept a book account of his dealings with Page & Noyes, in which he credited to them the machinery, &c., mentioned in the exhibits and for which the plaintiff claims to recover in this suit."

After the above finding had been made by the referee, counsel for the defendant submitted the following request:

"The counsel for the defendant objects to the following finding by the referee: From the course of business between these parties, the pecnuniary responsibility of said Lamplough at that time, and the way and manner the items mentioned in said four bills were purchased, the referee finds that it was understood when said property was delivered to said Lamplough by the firm of Page & Noyes, that said Lamplough was to take it and use it in the way and manner he did, and said firm would let him have it when he could pay for it," as unwarranted by the evidence, and asks to have the same struck from the report, but in case the same is allowed to remain, asks that the referee further find as follows: "The plaintiff, Page, was the only witness before the referee who testified in respect to the contract between Lamplough and Page & Noyes respecting the machinery, etc., furnished by Page & Noyes; that he did not testify to any express agreement with Lamplough that Page & Noyes should have any lien upon that property to secure the payment of the price, or any talk whatever with Lamplough on that subject, and that the facts stated, which are objected to, are found by the referee wholly upon the fact that Lamplough was without property, except what was encumbered by mortgage to the defendant."

In answer to this the referee made the following additional findings:

"In reference to the request for further finding of facts the referee does find that the plaintiff, Page, was the only witness who testified to the course of dealing generally between Lamplough and Page & Noyes. He testified that the firm took special pains to keep the title to the property furnished Lamplough, because he was not responsible; he did not testify to any express agreement with Lamplough that Page & Noyes should have a lien upon the property in controversy to secure the payment of the price, or any talk whatever with Lamplough on that subject; nor that the property was ever sold to Lamplough by any one; he testified that his partner, Noyes, had the charge of this lumber business, that he, Page, bought the machinery that was sent to Lamplough, after conferring with him about the improvements he wanted to make in his mill, and the kind of wheel and other things he wanted. There was no direct evidence that Lamp-

lough ever bought the property in controversy or agreed to buy it.

The referee submits to the court whether or not the evidence and facts detailed in the report have any tendency to show the facts found in that part of the report objected to by the defendant; if the court is of the opinion that the referee is in error as to the tendency of such evidence, and such finding is not warranted, then the facts stated in that part of the report aforesaid, which the defendant objected to, are not found."

E. R. Hard, for the defendant.

Personal property attached to the realty as this was becomes a fixture and passes under a previous mortgage, unless there is some element in the case which gives it the continued character of a chattel. 1 Jones Mort., ss. 428, 429; Boone Mort., s. 104; *Davenport* v. *Shants*, 43 Vt. 546.

The report in this case does not show any such element. There was no evidence which tended to show a conditional sale from the plaintiff's firm to Lamplough.

P. K. Gleed and H. M. McFarland, for the plaintiff.

The intention of the parties that the title should continue in the plaintiff's firm prevented these chattels from becoming a part of the realty and so passing under the mortgage. *Davenport* v. *Shants*, 43 Vt. 546; *Buzzel* v. *Cummings*, 61 Vt. 213.

The opinion of the court was delivered by

ROWELL, J. The defendant makes the case depend mainly or wholly on the nature and effect of the contract or arrangement between Page & Noyes and Lamplough, under which the property in question went into the latter's possession in the spring of 1881; whether it went into his possession as a mere bailee, without any contract of purchase on his part, or whether he took it under a contract of purchase that made him a conditional vendee. It is claimed that the report does not show any completed contract of sale, nor any sale nor arrangement that vested in Lamplough any interest in or title to the property more than

that of a bailee; and that therefore when the property was attached to the mill for the purpose and in the manner shown, with the knowledge and consent of Page & Noyes, who then knew of the defendant's mortgage, it became and was a fixture, and subject to the defendant's prior lien under his mortgage.

Soon after Lamplough bought the mill of the defendant in October, 1879, he made an arrangement with Page & Noyes, which continued till the time of his death, whereby they were to stock his mill with logs. The firm furnished the money to buy the logs, and Lamplough bought them in its name, sawed them, and delivered the lumber to the firm, which kept an account of the transactions, charging Lamplough with the money advanced, and giving him credit for the lumber received, it being understood that Lamplough was to have the benefit of the business above advances and interest and a dollar a thousand for selling, guaranteeing sales, and collecting the money; and to make the firm safe, the title to all the logs and lumber was to remain in the firm till it was fully paid.

In the spring of 1881, Lamplough wanted to put a wheel into his mill that would give him more power; and such a wheel would necessitate new shafting, gearing, pulleys, and other things to put the mill in good running order. He applied to Page & Noyes for advances for this purpose, and they supplied him with such things as he wanted, buying them in their own names and paying for them with their own money, and Lamplough put them into his mill, setting and attaching them in the usual way and in the manner necessary for use. Page & Noyes charged to Lamplough the amount thus expended in the same manner and in the same account that they charged the advances to buy logs, and Lamplough credited the firm with the machinery in a book-account that he kept of his dealings with the firm. Subsequently, and on June 30, 1881, Page & Noyes took a mortgage of the mill and the machinery and of other property,

to further secure them against loss, conditioned for the payment of all that Lamplough owed them, called about $1400, which included the amount they paid for the machinery, which was $670. The plaintiff was the only witness who testified to the course of dealing generally between Page & Noyes and Lamplough. He testified that the firm took special pains to keep the title of the property furnished to Lamplough, because he was not responsible; but he did not testify to any express agreement with Lamplough that the firm should have a lien on this property to secure the payment of the price, nor to any talk whatever with Lamplough on that subject, nor that the property was ever sold to Lamplough; but he testified that his deceased partner had the charge of this lumber business, although he himself bought the machinery that was sent to Lamplough, after conferring with Lamplough about the improvements he wanted to make in his mill and the kind of a wheel and other things he wanted. There was no direct evidence that Lamplough ever bought the property or agreed to buy it.

The referee finds that it was understood when the property was delivered to Lamplough by Page & Noyes, that as far as it could lawfully be done, the property was still to remain the property of the firm, that Lamplough was to take it and use it as he did, and that the firm would let him have it when he could pay for it; and he submits to the court whether or not the evidence and the facts detailed in the report have any tendency to support that finding.

That the evidence and the facts detailed tend to show a sale, not to say a conditional sale, does not admit of much doubt, we think. It is not necessary that there should have been direct evidence of a sale. Anything fairly tending to show that the parties understood the transaction as a sale is enough; and that they did understand the transaction to be a sale is evidenced by the facts that Page & Noyes debited Lamplough with the amount they paid for the machinery; that Lamplough credited them with

the machinery; that Lamplough used the machinery in a manner that makes against the idea that he was a mere bailee of it, and in favor of the idea that he was a purchaser of it; and that he secured the price of it by mortgage.

A sale being properly found, the testimony of the plaintiff, that his firm took special pains to keep the title of the property it furnished Lamplough, was quite susceptible, in the circumstances of this case, of being construed to refer to and include the property in question as well as other property; and being thus construed, it tended to show that this sale was conditional.

The plaintiff, then, is entitled to stand on the ground of a conditional sale unless the case contains elements disentitling him to stand there. Treated as a conditional sale, the cases of *Davenport* v. *Shants*, 43 Vt. 546, and *Buzzell* v. *Cummings*, 61 Vt. 213, are decisive in plaintiff's favor, unless this case is distinguishable. The doctrine of those cases is, that water-wheels and other mill machinery attached to mills as this was, retain their identity and character of chattels as against a mortgagee whose mortgage rested on the mill when the machinery was attached, and that the conditional vendor thereof has a right thereto superior to that of the mortagee, and may assert it against him.

But it is claimed that this case is distinguishable from those, in that here machinery in place when defendant took his mortgage was removed, and changes made in the building, to make room for the machinery in question, and that to remove this wheel would necessitate a destruction of the pen-stock and the box or inclosure around the wheel. But in *Buzzell* v. *Cummings* the wheel in controversy was substituted for one in place when the mortgage was given, although it was removable without material injury to the building. But whether so removable or not is not the test. The point of those cases is, not that the machinery in one and the wheel in the other were removable without injury to the buildings, but that the mortgagees were not misled, and had parted with nothing on the faith of the

machinery and the wheels being a part of the realty; and that therefore the conditional vendor's title was just as good against them as it was against the conditional vendees themselves.

It is further claimed that the vendors waived their lien by taking their mortgage. If such a lien comes within the category of liens waivable in that way, it is manifest that this lien was not waived; for the report finds that the mortgage was taken as further security, which rebutts the presumption of a waiver, as it shows an intention not to waive; and whether waiver or not is matter of intention.

There is no ground for the claim that the foreclosure of that mortgage was a satisfaction of the lien, as the report finds that over four hundred dollars remained due after applying the value of the property obtained by the foreclosure aside from this machinery.

Nor is plaintiff's title barred by the Statute of Limitations, as claimed; for there does not appear to have been any adverse possession by Lamplough for any length of time.

Judgment affirmed.

TAFT, J., with whom concurred MUNSON, J., dissenting. Whether the sale was conditional, was the decisive point in the case. The testimony of the plaintiff that his firm took special pains to keep the title of property furnished Lamplough in themselves could have had no reference to the property in question, for he did not testify in relation to it, nor to any agreement concerning it. Neither the fact that Lamplough was poor, nor the course of business of the plaintiff's firm to reserve a lien upon property furnished him, had a tendency to estabish a lien upon this property. There was no testimony before the referee tending to show the sale a conditional one, and the finding was unwarranted. I therefore advise a judgment for the defendant.

BLISS *v.* LITTLE'S ESTATE.

Practice as to costs.

1. The supreme court has no discretion in the allowance of costs accruing in the county court upon the trial of an appeal from the probate court.
2. In the absence of any declaration to the contrary, it is to be understood that costs in the supreme court are adjudged to the prevailing party.
3. Questions as to costs in the county court can only be properly brought before the supreme court by having the costs taxed and the question decided in the lower court and certified up as a part of the case.
4. Questions as to costs in the supreme court must be made while the case is before that court.

This was an appeal from a taxation of costs by the clerk of the County Court for the county of Washington. The case originally came from the Probate Court, and was determined in the County Court at the September term, 1889. From there it passed on exceptions to the Supreme Court, where it was argued at the General Term, 1890, and entered with the court. May 19, 1891, the following judgment order was handed down:

"This case was heard at the General Term, 1890, and entered with the court. The clerk will now enter, judgement reversed and judgment that the said sum of $2,193.29, parcel of the amount of plaintiff's notes mentioned in the record, cannot be decreed toward his share of the estate; this judgment to be certified to the Probate Court."

Upon the taxation of costs the clerk ruled that inasmuch as no costs were ordered by the Supreme Court, none were taxable. Thereupon the plaintiff applied to the judge having the case in Supreme Court, who directed the clerk by letter dated June 23, 1891, to tax full costs for the plaintiff. This the clerk then did, and the defendant appealed.

S. C. Shurtleff, for the defendant.

The Supreme Court having made no order as to costs, none can be recovered, nor can the case be re-opened. *Jones, Admr.* v. *Knappen*, 63 Vt. 391.

J. A. Wing, for the plaintiff, cited *Brigham* v. *Executors of same*, 15 Vt. 788; *Sargeant* v. *Sargeant*, 18 Vt. 330.

By the court, ROWELL, J. This was an appeal from probate, finally determined in vacation after last General Term. It now comes before us on a question of costs, which, in this class of cases, are discretionary—R. L. 2280—and have been since the act of 1833, No. 11. We adopt the construction put upon that statute in *Allen* v. *Rice*, 24 Vt. 647, and refer to that case for a statement of the law as to this court's power over costs in the County Court.

As to the costs in this court, it is so much of course for the prevailing party to have them, that it is understood as matter of practice, if nothing is said about them, that they are adjudged to him by implication.

Although this question is irregularly before us, we have entertained it for the purpose of having an opportunity to announce the practice in the reports.

In order properly to bring before this court questions of costs in the County Court, the costs should be there taxed and the question decided, and certified up as a part of the case. Questions as to costs in this court should be made while the case is before it, otherwise the court has no power in the matter.

HIRAM HATHAWAY *v.* DANIEL HAGAN.

Foreclosure of mortgage. Defendant may have decree for overpayment.

Where, upon a petition to foreclose a mortgage, the master finds that, after deducting the usury embraced in the mortgage notes, the orator has been overpaid, the defendant may, upon the filing of a cross-bill, have decree for the amount of such overpayment.

Petition to foreclose a mortgage. After the coming in of the master's report, the defendant filed a cross-bill, to which the orator demurred. Heard upon demurrer at the March term, 1891, Washington county. Munson, chancellor, sustained the demurrer and dismissed the cross-bill. The defendants appeal. The opinion states the case.

Dillingham & Huse and *T. J. Deavitt*, for the orators.

A bill of foreclosure in Vermont simply extinguishes the defendant's equity in the premises. Any balance due either way must be recovered by a suit at law. *Lovell* v. *Leland*, 3 Vt. 581.

A cross-bill can only be maintained by the defendant in reference to some matter growing out of the original bill. 2 Dan. Ch. Pl. Pr., 1548 and note 1.

If overpayments have been made, the defendant has a full legal remedy to recover the excess. 2 Jones Mort. 1085; *Close* v. *Phillips*, 7 M. & G. 585; *Cazmor* v. *Cutler*, 4 Met. 246.

Relief will not be granted upon a cross-bill, unless the decree asked for be of that kind which the court would have power to make on an original proceeding. A mere decree for the payment of money due is not of that sort. 2 Dan. Ch. Pr., 1549, note 3; Story Eq. Pl. 398 and 629; Cooper Eq. Pl. 86; *McMillen* v. *Richards*, 9 Cal. 419.

John H. Senter and *Wing & Fay*, for the defendants.

The court has power to permit any alteration of the pleadings which is necessary to terminate the controversy as in equity it should be. It might in this case properly allow the filing of a cross-bill, thereby giving the defendants the benefit of the final determination of the master in their favor. *Harrigan* v. *Bacon*, 57 Vt. 644; *Kopper* v. *Dyer*, 59 Vt. 477; *Rutland* v. *Paige*, 24 Vt. 181; *Slason* v. *Wright*, 14 Vt. 208.

The determination of the question as to what was due the defendants by reason of this transaction becamc *res judicata* by the decision of the master. *Regina* v. *Hartington*, 4 Ell. & Bl. 794; Big. Est. ss. 110, 111 and note; Freem. Judg. s. 256; Herman Est. and Res. Jud. s. 236; *Cromwell* v. *County of Sac.* 16 A. L. Reg. 721 and note and cases there cited; *Tams.* v. *Lewis*, 42 Pa. St. 410; *Babcock* v. *Camp*, 12 Ohio St. 37; *R. R. Co.* v. *Shults*, 103 U. S. 118, 143; *Bissell* v. *Kellogg*, 60 Barb. 617; *Wood* v. *Jackson*, 8 Wend. 9.

The Court of Chancery will not disregard the findings of a master. *McDaniels* v. *Harbour*, 43 Vt. 460; *Thrall* v. *Chittenden*, 31 Vt. 186.

A cross-bill is in the nature of a defence or of a proceeding to secure a complete determination of some matter which the orator has brought before the court. Hence a cross-bill itself need not show any ground of equitable jurisdiction. Equity having acquired jurisdiction in virtue of the orator's bill, will retain it until the matter is entirely disposed of. Adams Eq. 403; *Farquharson* v. *Seton*, 5 Russ. 45; *Cottingham* v. *Lord Shrewsbury*, 3 Hare 627; *Cartwright* v. *Clarke*, 4 Met. 104; *Nelson* v. *Dunn*, 15 Ala. 501; *Lambert* v. *Lambert*, 52 Me. 544; Sm. Ch. Pr. 460; *Kemp* v. *Mackrell*, 3 Atk. 812; *Shydell et al.* v. *Johnson et al.*, 25 N. E. Rep. 889; *Faught* v. *Faught*, 98 Ind, 470; Bisp. Eq. s. 37.

Hiram Hathaway *v.* Daniel Hagan.

The opinion of the court was delivered by

TYLER, J. The orator brought his bill to foreclose a mortgage, claiming that its condition had been broken by the non-payment by the defendant of two of the notes described therein, and praying that the defendant's equity of redemption in the mortgaged premises might be terminated by a day to be fixed by the Chancellor.

The affidavit, which the defendant filed and which seems to have been treated in the case as an answer, merely states that there was but little if anything due upon the notes. The case was referred to the clerk as master to ascertain what sum, if any, was due the orator.

The burden was upon him to produce his notes and make proof of the defendant's indebtedness to him. The master found that in the year 1867 the orator sold and conveyed a farm to the defendant and took from him five promissory notes of $300 each and another note of $361, the latter written without interest, all of which were secured by a mortgage on the farm; that the defendant paid the interest annually on all the notes and the principal of two of them prior to January, 1874; that the orator having pressed the defendant for payment, on February 24th, 1874, the parties made a new arrangement by which the defendant executed and delivered to the orator new notes amounting to $1435, dated December 1st, 1873, in lieu of the former ones, and secured them by the mortgage in suit. The master found that the $361 was a part of the basis of the new notes and was without consideration, and that a note for $120.50, the consideration for which was a sleigh worth five dollars, which the orator compelled the defendant to purchase of him for $70, and $50.50 rent of and damages to a cow, was also a part of the basis of the new notes; that the orator took advantage of the defendant's straitened circumstances and obtained from him the note for $120.50 of which only eleven dollars was valid; that the arbitration only related to three and a half month's interest, though the

orator claimed that it covered all matters of difference between himself and the defendant.

The master submitted to the Chancellor the question whether upon the facts found he should allow these sums to the orator. The Chancellor made a decretal order holding that the $361 note was without consideration and should be disallowed, that the orator had wrongfully received interest on it and that the defendant should be allowed all sums that he had paid as interest thereon, and that all but the $11 of the $120.50 was without consideration and should be disallowed. Pursuant to this order, from which there was no appeal, the master disallowed the above sums in his computation and necessarily found, as a mathematical result, that nothing was due the orator, but on the contrary that the sum of $929.04 was due the defendant from the orator as overpayments on account of usury.

The master states on page 3 of the report that the dispute between the parties in this litigation was in relation to these two notes. The real question and in fact the only one for his determination (besides the question of arbitration) was as to the character of these two controverted notes. The right of the orator to have a sum found due him in equity depended upon the validity of the new mortgage notes. If they were valid the amount of the two remaining unpaid was due him. If the $361 and the $109.50, which formed part of the consideration of the orator's new notes, were usurious, then the defendant had largely overpaid his debt. The usury extinguished the last two notes and left a balance due the defendant.

The defendant claimed that he was entitled to recover the $929.04, and appealed from the decree dismissing the bill. The orator filed no exceptions to the master's report and did not appeal. In this court the defendant's counsel insisted, first, that the defendant was entitled to a decree; second, if the court should refuse to direct a decree, that then the defendant be permitted to file a cross-bill to enable him to recover the above

named sum. The court sustained the decree of the Chancellor upon the matter of the arbitration; held that as to the $361 the case stood for disposition upon the facts reported; that the finding was final as to the $109.50, and that it was usurious, and said that the result of its holding upon the points raised in the report was that the defendant had largely overpaid his mortgage debt. The cause was remanded with liberty to apply for leave to file a cross-bill, which leave the Court of Chancery subsequently granted. *Hathaway* v. *Hagan*, 59 Vt. 75.

The master was the instrument of the court to ascertain what sum, if any, was due the orator in equity. The orator was bound to make out his case at the hearing. The defendant claimed that usury was inherent in the second series of notes, and the master was obliged to determine that question to enable him to decide whether or not any sum was due the orator, and he did decide it under the direction of the Chancellor, and the inevitable result of that decision was that the sum named in the report was due the defendant.

A master's office is a branch of the court. *Stewart* v. *Turner*, 3 Edw. Ch. 458. One of the duties of a master is the more effectual working out of details, which the judge, sitting in court, is unable to investigate. Adams' Eq. 379. The Court of Equity will not disregard the findings of the master except upon very clear evidence that they are erroneous. *Richards* v. *Todd*, 127 Mass. 167. In this State it was held, before the enactment of our Practice Act, that the Court of Chancery, or the Supreme Court, will not overrule or disregard the findings of a master to whom it has been referred to take the accounts upon a mortgage, unless for evident mistake on his part or evident corruption. *Thrall* v. *Chittenden*, 31 Vt. 186; *McDaniels* v. *Harbour*, 43 Vt. 460. Barrett, J., said in *Rowan* v. *State Bank et als.*, 45 Vt. 195: "It is firmly settled in this State that the master's report will be regarded as settling the facts which fall within his province to find, and which he reports as found, unless it appears

affirmatively that he has found facts without evidence, or against evidence." See also *Merrill* v. *Railroad Co.*, 54 Vt. 200, and *Waterman* v. *Buck*, 58 Vt. 519.

By Act. No. 17, Laws of 1878, regulating the practice in Courts of Chancery, it is provided that controverted questions in chancery cases may be tried, as to matters of fact, by masters appointed by the Court, and that their report, unless good cause be shown, shall when accepted be conclusive of all questions of fact in issue. R. L. 724, *et seq.* It is held that special masters appointed under this Act are substituted for the court in the finding of facts, and that their findings, upon legal evidence, are conclusive. *Randall* v. *Randall*, 55 Vt. 214.

The orator's counsel complain that the orator has never been placed in a situation where he could avail himself of the right to plead either the statute of limitations or other appropriate matter to the defendant's claim of overpayment. In *Warner* v. *Quinlon*, 50 Vt. 652, it was held that the established practice in foreclosure cases is, where the subject of inquiry and dispute is what is due, as depending on payments, or matter directly applicable to reduce the sum due, without affecting the validity of the mortgage as security, reference is to be made to the master in the first instance, and the subject is not to be litigated by answer, replication and proofs, as is done in other cases of ordinary equity cognizance and litigation. The action and decision of the court is to be had upon what is brought before the court as the result of such reference to the master, and not upon formal pleadings, and upon proofs addressed to the court in the first instance.

If it had so happened that the usury had only been of sufficient amount to reduce or even extinguish the sum due the orator upon his two notes, *Cross* v. *Mann*, 53 Vt. 501, would be full authority that the amount of the usury could have been applied as an equitable offset, without plea or answer. The only difference between that case and the one at bar is in the

fact that in the latter case the usury was of so large an amount that it not only extinguished the orator's notes but left a balance due the defendant.

If the defendant's claim against the orator had consisted of an account or other demand not growing out of the orator's notes it could not have been considered by the master, but here the usury was in the notes and affected the last ones to be paid, and on account of it the orator could not sustain those upon which he asked for a decree; hence the result arrived at by the master.

If the master has not determined tne question of usury then he has settled nothing, and it is still an open question whether or not there is a sum due the orator in equity. We think it must be held that the master has determined these questions and that they are not again open to controversy upon the principal of *res judicata* although no judgment or decree has supervened. The fact that in the state of the pleadings the defendant could not have a decree is not a reason why the orator should be allowed to re-open those questions. A decree was not entered for the defendant because the pleadings did not warrant it, but the court permitted him to file a cross-bill and thus adapt his pleadings to the facts found.

The case of *Dwinell* v. *Bliss*, 58 Vt. 353, was remanded with leave to the orator to amend his bill to meet the facts developed at the hearing before the master, with directions to the Court of Chancery to enter a decree accordingly. In *Harrigan* v. *Bacon*, 57 Vt. 644, the orator brought a bill to compel the defendant, a mortgagor, to discharge his mortgage. The defendant answered that there was a small amonnt still his due, and the master so found. The court permitted the orator to amend his bill into one to redeem. See, also, *Kopper* v. *Dyer*, 59 Vt. 477. While these cases are not directly in point here, they show the disposition of the court to permit the pleadings

in a case to be shaped so as to meet the facts that have appeared at the trial, that equity may be done.

It is argued that when the balance was found due the defendant he should have been remitted to his remedy at law, and *McMillan* v. *Richards*, 9 Cal. 419, is cited as authority. The case is in point that there was an ample remedy at law, but under the practice in this State the defendant may have his remedy by cross-bill. The usury grew out of the transaction which resulted in the giving of the mortgage. Usury was inherent in the mortgage, and it was proper for the court to retain the case that justice might be done between the parties. The Court of Chancery, having obtained jurisdiction of a cause for one purpose, will retain it for all purposes. *Barnes* v. *Dow*, 59 Vt. 530. "A cross-bill must be based upon an equity growing out of the claim set up in the original bill, and, in our practice, is considered a dependency merely upon the principal bill. It is usually brought, either to obtain a necessary discovery of facts in aid of the defence of the original bill, or to obtain full relief to all parties touching the matters of the original bill. *Slason* v. *Wright*, 14 Vt. 208 ; *Rutland* v. *Paige*, 24 Vt. 181." When it appears that the suit is insufficient to bring before the court the rights of all the parties and the matters necessary to a just determination of the cause, the court sometimes in its discretion, will at the hearing before publication, direct a cross-bill. Adams' Eq. 402, note.

The defendant says in his answer to the cross-bill, that the master proceeded to investigate the question of usury against his protest; but obviously, in order to determine whether or not anything was due the orator, the master was obliged to meet and settle this question.

It is not claimed that the facts were found against evidence, or without evidence, or that there was any error in computation. No exceptions were taken to findings or report. The defendant in the cross-bill admits in his answer that by reason of the pro-

ceedings had in the original cause he now claims nothing due him on the notes and mortgages and insists that there shall be a decree dismissing his original bill. If such a decree could be made it would be because of the determination of the master, which as necessarily and conclusively establishes the fact that $929.04 was due the defendant in the original suit as that nothing was due the orator.

The facts as found stand upon the record, and the orator in the cross-bill is entitled to recover the sum found his due unless his right of recovery is affected by the statute of limitations or unless some fact has arisen since the filing of the master's report that dis-entitles him.

Decree reversed and cause remanded with mandate.

JOSHUA B. FORD *v.* TOWN OF BRAINTREE.

Highways. Defect occasioned by insufficient culvert.

A hole in the highway at a point five rods distant from a culvert, which is occasioned by the fact that the culvert is not large enough to carry off the water, is not a defect in a bridge, sluice or culvert for which the town is responsible to a person injured thereby.

Action on the case to recover damages occasioned by an insufficient culvert. Trial by jury at the June term, Orange county, 1889, Taft, J., presiding. At the close of the plaintiff's case the court directed a verdict for the defendant, to which the plaintiff excepted.

The case appears in the opinion.

J. D. Denison, for the plaintiff.

The question of sufficiency is one of fact for the jury. *Sessions* v. *Newport*, 23 Vt. 9; *Washburn* v. *Woodstock*, 49 Vt. 503.

When an injury is the natural or probable result of negligence an action accrues. *Forney* v. *Geldmacher*, 75 Mo. 113; *Templeton* v. *Montpelier*, 56 Vt. 328; Am. Rep. 41, 53 to 58 notes; *Hill* v. *Windsor*, 50 Am. Rep. 569 to 574 notes; *Lane* v. *Atlantic Works*, 111 Mass. 136; *Brown* v. *Chicago, Mo. & Lt. P. R. R.*, 54 Wis. 342; *Campbell* v. *City of Stillwater*, 32 Minn. 308.

N. L. Boyden and *R. M. Harvey*, for the defendant.

The injury was not the direct result of the defective culvert. *Hyde, Admr.*, v. *Jamaica*, 27 Vt. 444; *Baxter* v. *Winooski Turnpike Co.*, 22 Vt. 114; *Trow* v. *Vt. Central Rd. Co.*, 24 Vt. 487; *Tisdale* v. *Town of Norton*, 8 Met. 388; *Holman* v. *Townshend*, 13 Met. 297.

The opinion of the court was delivered by

TYLER, J. Prior to the passage of the Act of 1880, towns were liable for damages that arose from the insufficiency or want of repair of their highways and bridges. By No. 62 of the Act of the Legislature of that year their liability was restricted to damages that arose from the insufficiency of bridges of not less that eight feet span. Act. No. 13, Laws of 1882, upon which this action was brought, enlarges the scope of the Act of 1880 and extends that liability to include damages caused by means of the insufficiency or want of repair of culverts and sluices which towns are bound to maintain.

Bridges, culverts and sluices form a part of the highway in which they are situated, and the liability of towns for damages, caused by means of their insufficiency, is continued by the present law for the obvious reason that they are more dangerous than the other portions of highways—defects in them often being of such a character as not to be perceptible to the traveler in passing over them—while towns are absolved from liability for damages occasioned by defects in all other parts of their highways.

The plaintiff's evidence tended to show that he was injured at a point in the highway five rods distant from the culvert in question; that the culvert was insufficient in not being large enough to carry off the water that collected in the ditch, and that in consequence the water set back and its action made the hole in the road which was the immediate cause of the accident.

If the defendant town is liable for damages caused by this defect in its highway it would have been liable had the defect been one hundred rods or at any other distance from the culvert, provided it could have been shown that the insufficiency or want of repair of the culvert was the primary though remote cause of

it. Many defects in highways might be traced to the insufficiency or want of repair of culverts and sluices as indirect causes. It might often be said that if there had been a larger culvert at a certain point, or the existing one had been kept unobstructed, the road at another point would not have been gullied and out of repair. But obviously it was not the intention of the Legislature to allow persons injured to recover damages for injuries sustained by reason of such defects. To give the construction to the Act which is claimed for it by the plaintiff would be to re-enact, by judicial decision, in part at least, the highway damage law which the Legislature has repealed. It would make towns liable for damages occasioned by other insufficiencies and defects in their highways than those specified in the Act of 1882. To come within the Act the accident must occur and the injury be sustained while the traveler is passing over the bridge, culvert or sluice, or that portion of the road which constitutes the approaches to it, so that the insufficiency or want of repair of the structure itself, or of its approaches, is the direct cause of the injuries sustained.

Judgment affirmed.

J. & W. AGNEW *v.* JEROME DUMAS.

Statute of Frauds. Sale. Delivery to carrier. Attachment.

Goods of the value of more than $40 were purchased orally by S. without delivery of any portion or payment of any part of the purchase money. They were to be delivered in B. by the vendor, the freight to be paid by the consignee and deducted from the purchase price. The consignee had never applied to the carrier for the goods nor paid the freight. *Held*, that the title remained in the vendor and that the goods could not be attached upon the debt of the vendee.

Trover for a quantity of tin-ware and rag sacks. Heard upon the report of a referee at the September term, 1890, Chittenden county, Rowell, J., presiding. Judgment for the plaintiffs for the value of the sacks only. The plaintiffs except.

The defendant attached and sold the property upon the debt of one Sterlovski, to whom it had been sold and sent by the plaintiffs. With reference to the contract of sale the referee reported:

"That upon the 5th day of April, 1888, at Port Henry, in the State of New York, by oral contract, the plaintiffs, partners in trade at said Port Henry, manufacturing and dealing in tin-ware and other tin peddlers' supplies, sold to one Jacob Sterlovski, living at Burlington, in the State of Vermont, a tin peddler, with no place of business except wherever he might happen to be with his cart, a stock of such supplies at the price of 254 dollars and 64 cents. The goods in kind and number were ordered by Sterlovski in person and orally without selection of the particular articles, which were afterwards taken from the plaintiffs' general stock to fill the order, and were shipped by plaintiffs to said Sterlovski at said Burlington, by rail, to be delivered at Burlington at the expense of the plaintiffs by such route as they should select, and upon the express understanding that said Sterlovski should pay at Burlington the freight charges for their transportation and be credited for the same by the plaintiffs upon the purchase price of the goods; and upon the further

undertaking upon the part of said Sterlovski that he would peddle out said goods in and about said Burlington in exchange principally for barter, and ship the barter to the plaintiffs to be likewise applied upon said purchase price."

The above property was, together with the rag sacks, shipped by rail under consignment to Sterlovski. Having arrived at Burlington it was placed in the freight house of the railroad company, where it remained uncalled for for several days; after which it was attached by the defendant, who at the time of the attachment paid the freight charges. Still later, the plaintiffs, learning that Sterlovski had become insolvent and absconded, demanded the property of the railroad company, and that demand being refused, brought this suit.

Roberts & Roberts, for the plaintiffs.

The defendant has no greater right than Sterlovski. *Hackett* v. *Callender*, 32 Vt. 97-108.

Under the contract of sale Sterlovski acquired no right to the possession of the goods until he had paid the freight charges. *Hale* v. *Huntley*, 21 Vt. 147; *Gibbs* v. *Benjamin*, 45 Vt. 124, 128; Benj. Sales, s. 320 and notes; Id. s. 592; *Towsley* v. *Dana*, 1 Aik. 344; 2 Kent's Com. 492, 496; *Morris* v. *Rexford*, 18 N. Y. 552, 555; *Fletcher* v. *Cole*, 23 Vt. 114.

The plaintiffs were to deliver the goods at Burlington and therefore the common carrier was their agent. Benj. Sales, ss. 330, 693; *Knulder* v. *Ellison*, 47 N. Y. 36, 40; *Craven* v. *Ryder*, 6 Taunt. 433; *Ruck* v. *Hatfield* 5 B. & Ald. 632; Benj. Sales, s. 824.

The contract of sale was void under the Statute of Frauds. Delivery to the carrier was not delivery to Sterlovski. Benj. Sales, 160, 181; Ad. Cont. 561, 571; Benj. Sales, 701, 703; Ad. Cont. 333, Id. 557; *Spencer* v. *Hale*, 30 Vt. 314, *Gibbs* v. *Benjamin*, 45 Vt. 130; *Strong* v. *Dodds*, 47 Vt. 348; *Rogers* v. *Phillips*, 40 N. Y. 519; *Maxwell* v. *Brown*, 39 Me. 98.

J. & W. Agnew *v.* Jerome Dumas.

W. L. Burnap and *J. J. Enright* for the defendant.

The sale to Sterlovski, followed by a separation of the goods from the general stock and a delivery to the common carrier, passed the title from the plaintiffs to him. There is nothing to show that the plaintiffs intended to retain the title. Benj. Sales, 359-360, 392 and case cited, 362, 392, 399 et seq, 693, 853, 399; *Strong* v. *Dodds*, 47 Vt. 348; *Hall* v. *Dimond*, (N. H.) 1. N. E. R., 848.

The opinion of the court was delivered by

TYLER, J. The contract between the plaintiffs and Sterlovski was a parol one for the sale of goods for the price of forty dollars and over, and no part of the price was paid and nothing was given in earnest to bind the bargain; therefore it was within the statute of frauds and not enforceable unless the goods were accepted and received by the purchaser or his agent.

The defendant's position, that the goods were accepted and received at Port Henry by the railroad company as a common carrier, acting as the servant and agent of the purchaser, cannot be maintained for the reason that by the terms of the contract the plaintiffs were to deliver the goods at Burlington. The carriers were therefore the agents of the plaintiffs for the transportation of the goods to the place of their destination.

The defendant's counsel makes the further claim that, when the goods had reached Burlington and been deposited in the carrier's freight house, the possession of the carrier was the constructive possession of the consignee; that the carrier's receipt of the goods was a sufficient compliance with the statute, and that the carrier thereafter held them for the consignee. We think, however, that the "express understanding" which the referee finds was had between the plaintiffs and the purchaser, that the latter should pay the freight at Burlington for the plaintiffs, makes the fair and only reasonable construction of the contract to be that the purchaser was personally to receive the prop-

erty on its arrival; that the payment of the freight and the taking of the property were to be contemporaneous acts; that the fact that he was to advance the freight precludes the idea of an implied authority in the carrier to receive the goods for him. As the consignee did not accept and receive them and did no act indicating an intention to do so, but absconded from the State before their arrival, the contract was not relieved from the statute of frauds. Neither the title nor the right of possession ever passed from the plaintiffs.

Judgment reversed and judgment for the plaintiffs for $196.38, the larger sum named in the report, interest and costs.

MT. MANSFIELD HOTEL COMPANY *v.* WM. P. BAILEY & TR.

Endorser. Interest. Demand and Notice.

1. The endorser of a promissory note bearing annual interest is liable for the interest as it falls due before the maturity of the note.
2. But he must be charged witn such liability by demand and notice.

Special assumpsit for the annual interest due on five promissory notes endorsed by the defendant. Plea, the general issue. Trial by court at the April term, 1890, Lamoille county, Munson, J., presiding. Judgment for the defendant. The plaintiff excepts.

The case appears in the opinion.

P. K. Gleed, for the plaintiff.

Geo. Wilkins, for the defendant.

To charge an endorser there must be a demand and notice. 1 Par. Bills & Notes, 353-356, 442, 443; Sto. Pr. Notes, s. 135; 2 Aik., 263; *Whitney* v. *Dean*, 22 Vt. 561.

The opinion of the court was delivered by

TYLER, J. It appears by the statement of facts that Geo. Doolittle and Mrs. E. J. Doolittle promised to pay the defendant, William P. Bailey, or order, five thousand dollars, as their five promissory notes should respectively become due, and the interest thereon annually. The notes are dated April 1, 1886, are for $1,000 each, and payable 16, 17, 18, 19 and 20 years from their date.

The plaintiff, as the indorsee of the notes, seeks to recover of the defendant, as indorser, the first three years' interest upon

them without demand of the makers and notice to the defendant of the makers' default of payment. The defendant's counsel contends, 1st, than the indorser cannot in any event be compelled to pay the interest as it annually falls due, that his conditional liability does not become absolute until the notes respectively mature, and then only after demand and notice; 2d, that if the interest is collectable of the indorser as it annually accrues it is after the usual measures have been taken to make him chargeable.

The general rule of law relative to the respective liabilities of the maker and indorser of a promissory note is well defined. The promise of the maker is absolute to pay the note upon presentment at its maturity. The promise of the indorser is conditional that if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due notice given him of the dishonor, pay the same to the indorsee or other holder.

It seems clear that the indorser is not liable for the annual payment of the interest without performance of the conditions by the holder. If he were thus liable his relation to the note would be like that of a surety or a joint maker, and his promise, instead of being conditional, would be absolute as to the payment of the interest. This is contrary to the general statement of the law that his liability is conditional. The relation of principal does not exist between him and the maker. They are not co-principals. Their contracts are separate and they must be sued separately, at common law. Randolph Com. Paper, s. 739. The maker has received the money of the indorser and in consideration thereof promises to repay it according to the terms of the note, and if he fails to pay, his contract is broken and he is liable for the breach. The contract of the indorser is a new one, made upon a new consideration moving from the indorsee to himself. His undertaking is in the nature of a guaranty that the maker will pay the principal and interest according to the terms of the note. His liability is fixed upon the maker's default upon de-

mand, and notice to him of such default. This new contract cannot be construed as an absolute one to pay the interest without default of or demand upon the maker. The promise cannot be absolute as to the payment of interest when it is clearly conditional as to the payment of the principal.

It is held that though the annual interest upon a promissory note may be collected of the maker as it falls due, it is not separated from the principal so that the recovery of it is barred by the statute of limitations until the recovery of the principal is thus barred. *Grafton Bank* v. *Doe et al.*, 19 Vt. 463. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand interest, and he has the election to do so, or wait and collect it with the principal, for it is regarded as an incident of the principal. *National Bank of North America* v. *Kirby*, 108 Mass. 497. But it is so far an independent debt that he may maintain an action against the makers for it as it annually accrues, or allow it to accumulate and remain as a part of the debt until the note matures. *Catlin* v. *Lyman*, 16 Vt. 44. In the latter course the makers would be chargeable with interest upon each year's interest from the time it was due until final payment. 1 Aik. 410; *Austin* v. *Imus*, 23 Vt. 286. It was said by the Court in *Talliaferro's Ex'rs.* v. *King's Admr.*, 9 Dana 331, (35 Am. Dec. 140): "The interest, by the terms of the covenant, is made payable at the end of each year, and is as much then demandable as if a specific sum equal to the amount of interest had been promised; and, in default of payment, as much entitles the plaintiff to demand interest upon the amount so due and unpaid. The fact that the amount so promised to be paid is described as interest accruing upon a larger sum, which is made payable at a future day, cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration in damages for the detention or non-payment."

It is true that at the maturity of the notes the defendant

would be liable, as indorser, for both principal and interest, upon due demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year. Notice of the maker's default of payment of interest need not be given annually to the indorser in order to charge him with liability for interest when the note matures. This is so stated by the Court in *National Bank of North America* v. *Kirby*, *supra*. In *Howe* v. *Bradley*, 19 Me. 31, it is held that when a note is made payable at some future period, with interest annually till its maturity and no demand is made for the annual interest as it becomes due, or if made, no notice thereof is given, the indorser, if duly notified of the demand and non-payment when the note falls due, is liable for the whole amount due, both principal and interest; that the obligation imposed by the law upon the holder is only to demand payment and give the required notice when the bill or note becomes payable. It is not held in this country that interest is subject to protest and notice, according to the law merchant, in order to charge indorsers with it when the note matures. The usual consequence of omission to notify the indorser of the maker's default, namely, the release of the indorser, would not follow the omission to give him annual notice of such default. A note is not dishonored by a failure of the maker to pay interest. *First National Bank* v. *County Commissioners*, 14 Minn. 77, (100 Am. Dec. 196, note).

The defendant's counsel argues that it would be inconsistent to hold the indorser liable for interest, which is a mere increment of the principal, until his liability is established to pay the sum out of which the interest springs; that there may be defences to the note at its maturity which will release the maker and consequently the indorser, or that the indorser may then be released by neglect of demand and notice. On first impression it might seem inconsistent that the *maker* should be compelled to pay interest before his liability has been fixed to pay the principal, but

that is his contract. It is also argued that the fact that the interest, when uncollected, is an incident of the debt so that as it annually falls due, demand and notice are not necessary in order to charge either the maker or the indorser with liability to pay it when the note matures, is ground for holding that the indorser is not liable for interest until he is made liable for the principal.

The question is whether the indorser, by the act of indorsement, promises to pay anything on the note till its maturity, at which time he clearly may be made liable for both principal and interest. The note bears upon its face an absolute promise by the *maker* to pay the principal when it becomes due and the interest thereon annually. His promise is two-fold. It is as absolute to pay the interest at the end of each year as to pay the principal at the end of the time specified. Now what is the nature of the contract which the *indorser* makes with the indorsee? His contract is not in writing, like that of the maker, but his name upon the note is evidence that he has received value for it, and also of an undertaking on his part that it shall be paid according to its tenor. When he indorses it and delivers it to the indorsee he directs the payment to be made to the latter, and in effect represents that the maker has promised to pay certain sums of money according to the terms of the note, that is, the principal at maturity and the interest annually; that if the maker fails to pay on demand, he, the indorser, will pay on due notice. His conditional promise is concurrent with the absolute promise of the maker. His liability to pay interest and principal, as each respectively falls due, arises from his contract. It *is* his contract that he will make payment whenever the maker is in default and he, the indorser, is duly notified thereof.

It is true that interest is an incident, an increment of the principal, and that the holder may wait for it until his note matures and then collect it with the principal. He may, however, by the contract, collect it as it falls due, of the maker, and upon the latter's default, of the indorser.

The courts of England have never recognized the American doctrine that interest is a mere incident, an outgrowth of the principal, and in many cases follows and is recoverable as such without an express contract. Until 37 Hen. 8, c. 9, it was unlawful to demand interest even upon a contract to pay it. Since the case of *DeHavilland* v. *Bowerbank*, 1 Campb. 50, interest has been allowed in England upon express contracts therefor, and not otherwise. Where there is such a contract interest stands like the principal in respect to the rights and liabilities of an indorser. Sedg. on Dam, 383; *Selleck* v. *French*, 1 Conn. 32, (6 Am. Dec. 189, note). In *Jennings* v. *Napanee Brush Co.* reported in Ca. Law Jour., Vol. 20, No. 19, in a learned opinion by McDougall, J., it was held that where there was an express contract to pay interest annually or semi-annually, it was not different from a contract to pay an instalment of the principal itself, and that notice to the indorser of the maker's default was necessary to charge the indorser with it. In that case the indorser was released from payment of the first two half-yearly instalments of interest for want of demand and notice.

While we adhere to the doctrine laid down in *Grafton Bank* v. *Doe, et al., supra*, that interest is in general an incident of the debt, it is consistent to hold that where the indorser is himself a party to the original contract to pay interest annually, as in the case at bar, by his indorsement he guarantees the performance of that contract. Any other holding would make the indorser liable for only a part of the maker's contract.

The case of *Codman* v. *The Vt. and Ca. Railroad Co.*, 16 Blatch. 165, has been brought to our attention. The trustees and managers of the Vermont Central Railroad Co. and the Vt. and Ca. Railroad Co., issued notes to the amount of $1,000,000 in sums of $1,000 each, payable to the defendant company, in twenty years from their date, with interest semi-annually on presentation of the interest coupons made payable to bearer and attached to the notes. On each note was this indorsement,

signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The coupons were not indorsed. The notes were put on the market and the plaintiff purchased fifty of them, and subsequently, after due demand, notice and protest, brought this suit to recover the amount of two coupons on each of his notes, the notes themselves not having matured. Without passing upon the question whether the guaranty was negotiable and available to the plaintiff, as a remote holder, Wheeler, J., among other questions that arose in the case, decided that the indorsement was a contract of indorsement running to the bearer, and that demand, notice and protest fixed the liability of the indorser to pay the coupons, and gave judgment for plaintiff for the amount of the coupons.

The Supreme Court of the United States has repeatedly held that the statute of limitations begins to run upon interest coupons payable annually or semi-annually, from the time they respectively mature, although they remain attached to the bonds which represent the principal debt. *Amy* v. *Dubuque*, 98 U. S. 470. Where the indorser is the payee of the note there would seem to be no difference in his liability in respect to interest whether the maker's promise to pay it is contained in the body of the note or in interest coupons not indorsed, the notes to which they are attached being indorsed, and the coupons being mentioned in the notes; but it is unnecessary to decide that question here.

Upon the facts found by the County Court this action cannot be maintained for the reason that the plaintiff never fixed the defendant's liability to pay the three years' accrued interest. It does not even appear that the makers refused payment of it or that they were requested to pay it before this suit was

brought; therefore nothing is due from the defendant to the plaintiff.

Judgment affirmed.

Ross, Ch. J., dissents.

ROSS, Ch. J. I concur in the disposal made of this case; and in most of the grounds and reasoning of the opinion. But I do not see my way clear to concur in holding, that an indorser upon a promissory note, payable on time, with the interest annually, can be made chargeable for the payment of the interest, before he can be, and is, charged with the payment of the principal. By placing his name on the back of the note as an indorser, without making any limitation upon his indorsement, he guarantees its payment, upon condition that the indorsee, when the time named in the note for its payment arrives, shall present it to the maker and demand its payment, and, if the maker fails to make payment, shall seasonably notify him of such failure. When this is done, the indorser promises to pay whatever of principal and interest, is then due upon the note. This condition attaches primarily to the principal of the note. I think it attaches to the interest only as it becomes a part of the principal. It seems to me to be illogical, and pressing the indorser's conditional undertaking beyond its proper scope and office, to hold that he can have his liability fixed to pay for the use, or legal rental of the principal, before his liability to pay the principal is fixed. Interest is legal damage, fixed usually by statute, for the detention and use of money. As soon as the money is due and payable, the law implies damage for its detention and use. It may also arise from the contract, for the detention and use of the principal before it is payable by the terms of the contract. When stipulated to be paid annually, it may be collected from the maker of the note at the end of each year, because such is his contract. It is an incident, and outgrowth from the principal. The promise to pay it, whether implied or expressed, is a

dependent promise. It is attached to and arises from the promise to pay the principal. When the interest is stipulated to be paid annually, and before the principal is payable, the maker when sued for the annual interest, because his promise to pay it is dependent upon his promise to pay the interest, may set up any defence to the suit for recovering the annual interest, which he could if the suit were for the recovery of the principal, such as fraud in the inception of the note; or want, or failure of consideration, or duress, or that his liability for the principal is conditional, the terms of which have not been complied with. If he defeats the action, it will estop the holder from recovering the principal when due, and *vice versa*. In I Herman on Estoppel and Res Judicate 231, it is said, "So in an action for interest due on a bond, a judgment for the plaintiff for the amount of interest claimed will be conclusive evidence in an action on the bond, and estop the defendant from alleging fraud, for the reason that it was a defence which was available in the former suit, and the presumption is that it was so used," citing *French* v. *Howard*, 14 Ind. 455; *Van Dolsen* v. *Abendroth*, 43 N. Y. Super. Ct. 470; *Preble* v. *Supervisors*, 8 Bis. 358, and *Edgell* v. *Sigerson*, 26 Mo. 583; *Cleveland* v. *Creviston*, 93 Ind. 31 (47 Am. R. 367.)

The opinion recognizes this intimate, attached and dependent relation of the promise to pay the interest annually to the promise to pay the principal, from which the interest springs. It recognizes that the statute of limitations does not begin to run on such promise to pay interest annually until the principal falls due, in accordance with *Grafton Bank* v. *Doe et al.*, 19 Vt. 463. This must be because, until severed by enforced collection or payment, interest is but an incident, and dependent of the principal. It also recognizes this relation in holding that the indorsee may allow the interest to accumulate, and may fix the indorser's liability to pay it, by a proper demand, default and notice in regard to the principal when that falls due. That is because liabil-

ity for the principal carries its dependencies. I concur in these holdings. They are supported by the decisions cited in the opinion. But they rest, and, in my judgment, can rest only on the basis that the promise to pay the interest annually, both for its consideration and enforcement is dependent upon the promise to pay the principal. The opinion also holds that the liability incurred by the indorsement is conditional, that that condition attaches to the entire note, and that the liability of the indorser must be fixed by demand, default and notice, in regard to the interest payable from the maker yearly, as well as in regard to the principal. It then seems to conclude, that, because the indorsee can lawfully demand and collect of the maker, whose promise to pay the principal is absolute, upon his dependent, but yet absolute promise to pay the interest annually, he can by proper demand, default and notice, collect such annual interest of the indorser whose promise and liability to pay the principal is conditional, and cannot as yet be made absolute, and whose promise to pay the annual interest, it has already held is dependent upon his promise to pay the principal, and therefore, in my judgment, takes the condition attached to his liability to pay the principal. It is at this point that I fail to follow the reasoning of my associates. Here they assume,—as I think—and proceed upon the basis, that, the indorser's implied promise to pay the annual interest, is not dependent, but independent, like what it would be, if it were an instalment of the principal. The holdings in the opinion, that the indorser's liability for the accrued annual interest may be made absolute by a proper demand, default and notice in regard to the principal when it falls due, and that it may also be made absolute by a proper demand, default and notice yearly, result in holding that the maker's promise to pay the interest annually which he indorses, is both dependent upon, and independent of, his promise to pay the principal. I do not think that it has this double and inconsistent character, but only the former. If it be independent, must not demand

and default be made, and notice given yearly, or the indorser become discharged? And if demand and default be made, and notice given annualy, must not the statute of limitation begin to run from date of such demand? I think so. The result of giving this double character to the promise to pay interest annually will lead, I think, to some difficult legal problems. If the note is to mature at the end of twenty years, and the payee holds it and allows the interest to accumulate for ten years, and then having indorsed it, sells it, the the indorsee must wait for the accumulated interest until the note falls due, because the maker's promise and the indorser's liability in regard to that interest is dependent upon the indorser's liability for the maker's promise to pay the principal, which is still conditional, and for that reason the indorser's liability to pay the accumulated interest is conditional, and will remain so until it is made absolute for the principal; but when the eleventh year's annual interest falls due, the indorsee may at once, by due demand, default and notice, fix the indorser's liability to pay that year's interest, and may enforce its payment by suit, while the indorser's liability for the payment of the principal from which the year's interest springs, cannot for years be made absolute and may never be. After the indorser's liability for the payment of the year's interest has thus become fixed by suit, on what legal principles governing *res judicata*, could the indorser defend, in a suit brought, without further demand, default and notice, at the maturity of the note, for the enforcement of the payment of the principal and the ten years accumulated interest?

The only decision relied upon for the holding of my associates is from 6 Blatchford. I do not regard that in point. The guarantee was written instead of implied. The relation of the indorser to the obligation was exceptional, it having been given by its receivers and managers. The interest was expressed in

separate coupons, which, for some purposes, are treated as independent obligations. The statute of limitations runs on them generally from their maturity. *Amy* v. *Dubuque*, 98 U. S. 470 (25 L. C. P. Co. 228). In this respect they are unlike the promise in the note to pay the interest annually, as held in *Grafton Bank* v. *Doe* et al., 19 Vt. 463. I do not think that the indorsee has the election to fix the indorser's liability for, and recover of him annually such yearly interest, or to wait and fix it by proper demand, default and notice in regard to the principal. I think his liability can only become absolute for the payment of the incident or outgrowth of the debt, when it becomes absolute for the payment of the principal from which that incident or outgrowth springs. The opinion on this branch of the case is made to rest upon the ground that the indorser's undertaking, on due demand and notice, is to make good to the indorsee any failure of the maker to perform the contract, and, in that the maker has promised to pay the interest at the end of each year, the indorser has likewise so undertaken upon proper demand and notice. But his implied contract being conditional in regard to the payment of the principal, I think is conditional also to any incident or outgrowth of the principal, so long as it is conditional in regard to the payment of the principal, and that he only becomes absolutely bound to pay the interest at the end of each year, when he becomes bound absolutely to pay the principal. When so bound for the payment of the principal, then this obligation to pay the interest at the end of each year attaches, in respect both to the interest then accrued, and the interest which may thereafter accrue. I would modify the opinion in the particular indicated.

HENRY McCOLE *v.* L. R. VARNUM.

Agreement to convey real estate. Title to crops. Attaching creditors.

1. Where the purchaser of a farm goes into possession under contract with the owner that certain specified payments shall be made, and that until so made all the products of the farm shall be the property of the owner, who may at any time take possession of the same upon breach of the conditions of the contract, the making of the payments is a condition precedent to the acquiring of any title to such products by the purchaser.

2. If upon breach of the conditions the owner actually takes possession of the farm and products, the same are not attachable upon the debts of the purchaser, although he is still temporarily living upon the farm.

Replevin for a quantity of hay, oats and barley. Heard upon the report of a referee at the December term, 1890, Caledonia county, Tyler, J., presiding. Judgment *pro forma* for the defendant. The plaintiff excepts.

The opinion states the facts.

Bates & May, for the plaintiff.

The plaintiff's possession of the real estate carried with it the possession of the personal property. *Flannagan* v. *Wood*, 33 Vt. 343.

The referee has found that the plaintiff had actual possession of the farm and crops before the attachment by the defendant, and that finding is conclusive. Prof. Jury Trial, s. 289; *Beverly* v. *Burke*, 9 Ga. 440; S. C. 54 Am. Dec. 351; *Kidder* v. *Kennedy*, 43 Vt. 713; *Sessions* v. *Newport*, 23 Vt. 9.

Under the contract the crops raised upon the farm belonged to the plaintiff. *Buswell* v. *Marshall*, 51 Vt. 87; *Walworth* v. *Jenness*, 58 Vt. 670.

J. P. Lamson, for the defendant.

The contract was no more than a mortgage, the plaintiff being the mortgagee. The title to crops grown is in the mortgagor so long as he remains in possession. *Cooper* v. *Cole*, 38 Vt. 185; *Leland* v. *Sprague*, 28 Vt. 746; *Walker* v. *King*, 44 Vt. 601; S. C. 45 Vt. 525.

The opinion of the court was delivered by

TYLER, J. It appears by the referee's report that on the 27th day of September, 1881, W. H. Lynds was, by the Court of Insolvency for Caledonia County, adjudged an insolvent, and that all his estate, including the farm on which he and his wife resided, was, on the same day, duly conveyed to the assignee in insolvency. On November 16th of that year, the assignee, by a quit-claim deed, conveyed the farm to the plaintiff, and on January 4th following, Lynds and wife quit-claimed to him all their interest in the farm. On the same day the plaintiff made a written contract with Mrs. Lynds, by which she undertook to pay him $1000 for the farm, in five annual installments of $200 each, and the interest and taxes, McCole on his part agreeing that, upon such payments being made and certain other conditions named in the contract being performed, he would execute and deliver to her a warranty deed of the premises. The contract further provided that, until the $1000 was fully paid, all the hay, grass, and all other crops of whatever name or nature, raised upon the farm, should remain the property of McCole, and that upon the failure of Mrs. Lynds to perform any of the agreements on her part to be performed, McCole might at any time take possession of the premises and retain, as liquidated damages. all sums of money that had been paid on the contract.

During the pendency of the insolvency proceedings and down to about Sept. 1, 1886, Lynds remained in possession of the farm, carried it on and sold the produce in the same manner that he had done prior to his insolvency. This contract was

lodged in the town clerk's office and filed, but was not recorded, and remained in the town clerk's office until March 24th, 1886, when it was taken away by Lynds, and about Sept. 1, 1886, it was surrendered by him to McCole, who afterwards, and prior to Sept. 15th, went into possession of the farm and crops, by virtue of the contract, the conditions of which had been broken.

While McCole was thus in possession of the farm and crops these attachments were made by the defendant. Mrs. Lynds was then residing upon the farm, and the furniture and other personal property remained there until Sept. 18th, when they were removed, and Mrs. Lynds removed to Massachusetts to join her husband, who went there about Sept. 1st.

The assignee's deed conveyed to the plaintiff all of Lynds' right and title to the farm except the homestead, and the deed from Lynds and wife must have divested them of that interest, and made the plaintiff's title complete, except as against the mortgages referred to in the report.

After the execution and delivery of these deeds, Lynds and wife had no interest in the farm other than that acquired by the contract with McCole, by the express terms of which all the hay, grain, grass, and all other crops raised upon the farm remained the property of McCole until all sums specified in the contract were fully paid, and upon the failure of Mrs. Lynds to perform any of the terms of the contract, on her part to be performed, McCole might declare the contract forfeited and vacated and take possession of the premises.

The referee has found that a time came when Lynds and wife decided to give up the contract and proceed no further under it; that, in accordance with its provisions, it was surrendered to the plaintiff, who, at once and before these attachments were made, took possession of the farm and of the harvested and unharvested crops upon it. The right of Mrs. Lynds to the crops was contingent upon performance of the terms of the contract. Payment of the $1000, the taxes, etc., was, by the terms of the contract,

a condition precedent to any right in her to the crops grown upon the premises. This was held in *Batchelder v. Jenness*, 59 Vt. 104, and in cases cited in the opinion of the court in that case.

The fact that Mrs. Lynds remained upon the farm until after the attachments were made, shows no joint possession by her and the plaintiff in view of the facts that the contract had been surrendered and that she was there temporarily awaiting the completion of arrangements for her to join her husband in Massachusetts.

The facts reported show title in the plaintiff.

The pro forma judgment is reversed and judgment rendered for the plaintiff for nominal damages and costs.

HARMON MORSE, EXR. OF J. W. TURNER'S ESTATE *v.* ARTHUR LYMAN & OTHERS.

A court of equity will not construe a will as to future contingencies. Parties. Costs.

1. A Court of Equity will not, if it has the jurisdiction, which is doubted, construe a will as to future and uncertain contingencies: but only when such construction is needed to direct the executor as to some present act.
2. The will directed that the income of certain property should be paid to certain legatees for a given time, and that at the expiration of that time the principal fund should be distributed. *Held*, that, no question arising as to the division of the income, a bill would not lie for a construction of the will as to the proper distribution of the principal, until at least the time for such distribution arrived.
3. In the event of the death of one of the legatees before a certain period, his share of the principal fund was payable to the American Board of Foreign missions. *Held*, that that society would be a necessary party to a suit for a construction of the will as to the distribution of the principal fund.
4. The suit being a friendly one, no costs are allowed.

Bill for the construction of a will. Heard upon bill and answers at the April term, 1891, Lamoille county. Start, Chancellor, dismissed the bill *pro forma* with costs. The orator appeals.

C. P. Hogan for the orator.

Frank Plumley, and *Powers & Powers*, for Henry W. Turner and Roy W. Turner.

P. K. Gleed for Arthur Lyman.

E. R. Hard for Brush.

Harmon Morse, Exr. of J. W. Turner's Estate *v.* Arthur Lyman & others.

TYLER, J. This bill is brought by the executor of the last will of Joseph W. Turner, against the legatees in the will and the purchaser and assignee of certain legacies. It sets out the will which is as follows:

"I, Joseph Warren Turner of Cambridge, in the County of Lamoille, and State of Vermont, being of sound mind do make and publish this my last will and testament.

1st. I give, devise and bequeath all my household furniture to my son, Charles Walker Turner, to have and to hold forever.

2d. I give, devise and bequeath all interest and income on all my property, personal and real estate, not hereinbefore disposed of to Charles W. Turner and Arthur Lyman, son of Seymour Lyman, as follows: I give, devise and bequeath one-half of said interest and income to said Charles W. Turner during his natural life, and in case of his death I give, devise and bequeath said C. W.'s interest and income to Henry W. Turner and Roy W. Turner, said C. W. Turner's sons, each one-half, and to be paid them for ten years, then principal to become theirs. The other half of said interest and income from all my property not herein disposed of, I give, devise and bequeath to Arthur Lyman, son of Seymour Lyman, and to be paid to the said Arthur for ten years, then the principal to become his. In case of his death before the expiration of ten years, then in that event, said Arthur leaving no heir or heirs, I give and bequeath and devise the said principal to the American Board (so called) and for foreign Missions."

To the will the following codicil was added:

"I hereby change the foregoing will so as to give the said C. W. Turner two-thirds of said interest and income and one-third to the said Arthur Lyman."

The bill alleges that the testator died Oct. 26, 1886, that his will and codicil were probated in the Probate Court in the District of Lamoille on the 7th day of December, 1886, and that the orator was appointed executor; that at the time of the death of the testator all the legatees named in the will were living; that Charles W. Turner died October 16, 1887, leaving the legatees Henry W. and Roy W. and Arthur Lyman surviving him; that the defendant Reuben Brush, claims to have acquired the

interest of the sons of Charles W. Turner in the estate by virtue of a sale and assignment from them, and that doubts have arisen in respect to the proper construction of the will and codicil and as to the shares of the estate which the three legatees will respectively be entitled to receive. The executor prays the Court of Chancery to give the true construction to the will and advise him whether Henry and Roy are to take one-half of the principal of the estate, and Arthur one-half, or whether the three legatees are to share equally.

As the testator died in October, 1886, and as no division of the principal can be made until the expiration of ten years from that date, when Arthur Lyman is to come into possession of his share, no occasion can arise for a construction of the will in respect to a division of the principal until October, 1896, except in the event of Arthur Lyman's death before that time without heirs.

In the notes to *Bowers* v. *Smith*, 10 Paige 193, Law. Co-op. Ed. these rules are laid down and sustained by abundant authority: Heirs at law and devisees, who claim a mere legal estate in the property, when there is no trust, are not allowed to come into a court of equity for the sole purpose of obtaining a judicial construction of the provisions of a will; on the contrary, the decision of such legal questions belongs exclusively to the courts of law, except where they arise incidentally in courts of equity in the exercise of its legitimate powers, or where courts of equity have obtained jurisdiction of the case for some other purpose; that jurisdiction to give construction to a doubtful or disputed clause in a will is incidental to and an outgrowth of its power over trusts; that trustees have a right to come into a court of equity for its assistance and protection in all cases of doubt and difficulty in the administration of a trust, or for its direction as to whether the trust ought to be executed. In *Emmons* v. *Cairns*, 2 Sand. Ch. 369, it was held that the court would not sustain a bill for the mere purpose of construing a will, but only

when questions under the will arise incidentally in the exercise of the legitimate powers of the court, where it has jurisdiction for some other purpose, that such construction can be given, as in cases of trust, account and the like.

In Pomeroy's Eq. Jur. ss. 1156, 1157, it is conceded that there is not an entire uniformity in the decisions by courts of different states upon this subject, that some able courts hold that this jurisdiction is not necessarily connected with the general jurisdiction over trusts, but arises from the complicated character of the provisions of wills and from the difficulty in understanding their meaning, or from the doubt and uncertainty as to the rights and interests of the parties claiming under them; yet it is insisted that the doctrine which seems to be both in harmony with principle and sustained by the greater weight of authority is, that the special equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that generally the court of equity will not exercise a power to interpret a will which deals only with and disposes of purely legal estates or interests and which makes no attempt to create trust relations with respect to the property donated. But though courts may hold variously upon this subject, the author declares it to be a well settled rule that the court will never entertain a suit to give construction to or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent and uncertain.

It is laid down as a rule in *Powell* v. *Demming*, 22 Hun. 235, that the court will only give construction to a will when it will determine and direct some present or contingent act or conduct of the executor or trustee. In *Minot* v. *Taylor*, 129 Mass. 160, the court was requested to give a construction to the will of William Taylor. Morton, J. defined the then present duties of the trustee and refused instructions as to duties which were future and uncertain, and said: "The trustee has the right to ask the instruction of the court as to his present duties, but not as to

what may be his duty in future uncertain contingencies." *Treadwell* v. *Cordis*, 5 Gray 341. See also, *Tayloe et al.* v. *Bond et als.*, Busbee's Eq. 5.

The executor asks the court to interpret this will and advise him what share of the estate of their grandfather Henry W. and Roy W. will take in October, 1896, until which time they are to take annually two-thirds of the income and nothing more. The question is too remote. The executor has no present necessity or occasion to decide it in the due administration of the estate. His present duty is to keep the property safely invested and distribute the income among the three legatees according to the directions given in *Lyman* v. *Turner's* executor, 62 Vt. 465. When the occasion arises for the division of the principal the Probate Court will be the proper tribunal to make a decree of distribution. R. L. 2018.

If it were proper for this court, in the present posture of the estate to give interpretation to the will, the American Board would be a necessary party to the decree, for, in the event of Artliur Lyman's decease without heirs before the expiration of ten years from the decease of the testator, then his share is devised to that corporation, and it would have a right to be heard upon the question whether that share is one-third or one-half of the estate. The case falls within no exception to the general rule in equity, that all persons materially interested, either legally or beneficially, in the subject matter of the suit are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all. "If by the death of a person, having, when the suit is commenced, the first estate of inheritance, that estate should be determined, the person having the next estate of inheritance, and all the persons having prior interests, must be before the court." Story's Eq. Pl. ss. 72, 147.

The decree of the Court of Chancery is affirmed and the cause remanded with mandate that a final decree be entered dis-

missing the bill. As it is a friendly suit, the bill being filed by the executor against the legatees for the purpose of obtaining a construction of the will, neither party is allowed costs, Randall v. *Josselyn*, 59 Vt. 557.

TRENOR L. PARK *v.* DANIEL McGOWEN AND L. S. NORTON, ADMR.

Partnership. Action of account. Deceased partner. Declaration.

1. A partner may under R. L. ss. 1214, 1215 sustain the action of account against a surviving partner and the administrator of a deceased partner.
2. The declaration in such a suit need not allege that the administrator has received property belonging to the estate or to the firm.

Action of account. Heard on general demurrer to the plaintiff's declaration at the December term, 1890, Bennington county, Taft, J., presiding. The demurrer was sustained and the plaintiff excepted.

Batchelder & Bates and *O. M. Barber*, for the plaintiff.

The action of account takes the place of a bill in chancery and will lie against an administrator. *Newell, Admr.* v. *Humphrey*, 37 Vt. 268; *Richards* v. *Dagget et al.*, 4 Mass. 537; *Ryegate* v. *Wardsboro*, 30 Vt. 746; *King* v. *White*, 21 Atl. Rep. 135; *Wyman* v. *Wilcox's Estate*, 21 Atl. Rep. 1104.

Sheldon & Cushman, for the defendant.

At common law the action of account did not lie between more than two partners nor against the representatives of a deceased partner. The statute has not modified the common law in the latter respect. *Foster* v. *Ives*, 53 Vt. 460; *Curtis* v. *Curtis*, 13 Vt. 517.

Trenor L. Park *v.* Daniel McGowen and L. S. Norton, Admr.

MUNSON, J. This case presents the question whether by virtue of R. L. 1214, 1215, the action of account can be maintained by one partner against another surviving partner and the administrator of a deceased partner. At common law this action could not be maintained where there were more than two partnership interests. Section 1214 extends the remedy to accountings among three or more partners, but does not in terms authorize the suit where one partnership interest is represented by an administrator. But s. 1215 empowers the County Court to make in these cases such interlocutory and final decrees as the Court of Chancery could make in the settlement of partnership matters, and to enforce its judgments in any manner in which the Court of Chancery could enforce decrees of like import. In view of the remedial purpose of the Legislature, and of the full chancery powers conferred upon the County Court to that end, we think the statute may properly be held to authorize this suit.

It is not essential that the declaration contain an allegation that the administrator has received property belonging to the estate of the intestate or to the firm. The purpose of the suit, as against the administrator, is to charge the estate of his intestate with whatever the intestate may have received from the partnership above his just proportion; and the plaintiff's right to have such excess ascertained and put into judgment does not depend upon what the administrator may have received.

Judgment reversed, demurrer overruled, declaration adjudged sufficient, and cause remanded.

E. E. HOLMES *v.* FRANK LARAWAY.

Payment by order. Acceptance. No recovery by defendant without plea in offset.

1. It being understood as a part of the contract for the purchase of certain lumber by the plaintiff that the purchase price should be paid by an order on the defendant, the giving of the order by the plaintiff and its acceptance by the defendant would be a payment for the lumber, and would discharge the indebtedness of the defendant to the plaintiff *pro tanto*.
2. The indebtedness so discharged could not be revived without the consent of the defendant.
3. *Held*, that upon the facts in this case there was an acceptance of the order.
4. A defendant cannot have judgment for a balance his due upon the report of a referee where no plea in offset has been filed.

General Assumpsit. Plea the general issue. Heard at the April term, 1891, Lamoille county, Start, J., presiding, upon the report of a referee. Judgment for the plaintiff. The defendant excepts.

The plaintiff claimed to recover a balance of $15 for work done. The referee found that one item in the plaintiff's account, amounting to $1.15, had accrued to the firm of the plaintiff and was still owned by it; but that the balance of the account, being $13.85, was due the plaintiff unless it had been paid by the giving and acceptance of a certain order.

The plaintiff purchased some lumber of one Clark. As a part of the contract of purchase it was agreed that it should be paid for by an order on the defendant. The plaintiff executed and delivered to Clark such an order in the sum of $15. As to its acceptance by the defendant the referee reported the following facts:

E. E. Holmes *v.* Frank Laraway.

"The plaintiff claims that there was no acceptance of this order by the defendant, even though the facts sworn to by defendant and his witnesses be true, consequently the referee reports what was said and done concerning this order, and what the parties understood the effect of their words and acts to be, and leaves the question as to whether there was a legal acceptance of the order for the Court. It is found that, at some time subsequent to the giving of the order, the exact date not being shown in the evidence, Mr. Fullington presented the order to the defendant for acceptance, a Mr. Seely and Jed P. Clark being present besides the defendant and Mr. Fullington. Mr. Clark picked the order up from the table, where it had been placed by Mr. Fullington, and said to this defendant; 'What about this order, Frank?' The defendant replied: 'I will accept this order, for it is good, and will fix it with Holmes if on settling I should not owe him so much.' I do not find that Clark did or said anything more than already stated. It is found as a fact that Clark's agent agreed with the plaintiff to take an order on the defendant for $15, if defendant was willing, as part payment for the lumber and wood sold. That at the time said order was presented the defendant undertook to bind himself to pay the $15 named in the order to Clark. The remark of the defendant at the time of the presentation of the order, that he would fix it with Holmes, if on settling with Holmes it turned out that he did not owe him so much, was not intended or understood to mean that if he owed Holmes $15 he would pay the order to Clark, but that he would pay the order in any event, and if that amount was more than he owed Holmes, then he and Holmes would settle that matter themselves."

The defendant never paid Clark the amount of the order, and the plaintiff did subsequently pay Clark for the lumber, whereupon the order was returned to him.

B. A. Hunt, for the defendant.

By the giving and accepting of the order the debt of the plaintiff was discharged and a new one to Clark created. 1 Par. Cont. p. 242 and notes.

T. J. Boynton, for the plaintiff.

At most the order only suspended the original indebtedness; which was revived upon the failure of the defendant to pay the

order. *Tory* v. *Baxter*, 13 Vt. 452; *Tracy* v. *Pearl*, 20 Vt. 162; *Hays* v. *McClurg*, 4 Watts. 452; *Burdick* v. *Green*, 15 Johns. 247; *Stebbins* v. *Kellogg*, 5 Conn. 265; *Good et al.* v. *Singleton*, 40 N. W. 359; *Russell* v. *Critchfield*, 39 N. W. 186; *Burden* v. *Halton*, 4 Bing. 585; *Rolt* v. *Watson*, 4 Bing. 273; *Woodford* v. *Whitely*, M. & M. 517; *Tarlton* v. *Alhusen*, 2 Ad. & E. 32; *Robinson* v. *Reed*, 9 B. & C. 449; *Lapley* v. *Martins*, 8 T. R. 451; *Burden* v. *Halton*, 4 Bing. 454.

The opinion of the court was delivered by

MUNSON, J. The referee has not in terms reported that the order in question was accepted, but in submitting certain facts with a view to having that matter determined by the court, we think he has in effect found an acceptance. It appears that Clark's agent presented the order to the defendant for acceptance, and that the defendant said, "I will accept this order, for it is good, and will fix it with Holmes if on settling I should not owe him so much." It is found that by this the defendant meant, and was understood to mean, that he would pay the order in any event. An unconditional acceptance of the order is thus established.

The plaintiff had bought lumber of Clark under an arrangement that he should pay for it by an order on the defendant, if the defendant was willing; and the order accepted as above stated was given in pursuance of this understanding. It will be noticed that by this arrangement the plaintiff's indebtedness to Clark was to be satisfied by the acceptance of the order, without regard to its payment. At the time of acceptance, therefore, both the plaintiff's indebtedness to Clark and the defendant's indebtedness to the plaintiff were extinguished. After this, the defendant's indebtedness was to Clark, who had taken his acceptance in lieu of a claim upon the plaintiff. Clark could not afterwards undo the transaction by returning the order to the plaintiff, nor could the plaintiff enable him to accomplish this by con-

senting to its return. The original liabilities could not be revived without the concurrence of all the parties interested. The defendant still owes the order to Clark, and does not owe the account upon which the plaintiff has brought suit.

The order was drawn for the amount due the plaintiff as shown by his book. The referee has disallowed a small item included in the plaintiff's charges, so that the defendant's acceptance overpays the plaintiff's account as now ascertained. In view of this result, the referee presents an alternative finding which entitles the defendant to a small balance upon the disposition now made of the order by the court. But as no plea in offset was filed, the defendant cannot be given judgment for this balance. *Fulton* v. *Wiley*, 32 Vt. 762; *Warren* v. *Caryl*, 61 Vt. 331.

Judgment reversed and judgment that defendant recover his costs.

CHARLES H. CROSS *v.* JANE G. FROST.

Construction of deed. General words restricted by special.

1. Where words of particular designation are followed by those of general import, the latter include only things similar in character to those specially named.
2. Where a deed provided that the grantor should not put upon the premises "any buildings, timbers, trees, or other nuisances", the words "other nuisances" will not include excavations unless it appears from the whole instrument that such was the intention.
3. *Held*, that no such intention could be inferred from the deed and circumstances in this case.

Bill in chancery to compel the defendant to restore certain land to its former grade. Heard at the March term, 1891, Washington county, upon the pleadings and a master's report. Munson, Chancellor, dismissed the bill *pro forma*. The orator appeals.

In August, 1887, one Brooks was the owner of a dwelling house on East State street in the village of Montpelier. The orator owned a tenement house next to it upon the same street and one Guernsey owned and occupied a dwelling behind it and back from the street. The ell of the Brooks house was so situated along the street that it obstructed the view from the orator's tenement, and completely cut off that from the Guernsey house. Access to the Guernsey house from the street was had through a passage way about ten feet wide between the ell and the orator's tenement. This being the condition of things, on Aug. 4, 1887, Brooks conveyed to Guernsey the said ell part of his house, not the land, by warranty deed, which contained the following description and conditions:

"All the buildings standing on East State street in the village of Montpelier on land owned by said Ruth E. Brooks,

comencing at the south-west corner of the land now owned by C. H. Cross on said street, thence westerly on the north side of said street about 28 feet or so as to run through said house following the partition just east of the door fronting south, thence through said house on a line with said partition to the north side of said house, thence easterly about 29 or 30 feet to the north-west corner of said Cross' land, thence on said Cross' line to the place of beginning; and said E. V. Guernsey is to remove said building and to finish up the end of the outside where the building is cut in two by boarding and clap-boarding the same in a proper manner, and lay a wall under the end of said building; she may use the stone under the said building for the same; fill the cellar and put on loam and manure to the satisfaction of said Brooks; the said Brooks is to clear the premises ready for removal in a reasonable time, and in consideration aforesaid they agree never to put or place any buildings, timber, trees, or other nuisances on said land, and the same is always to remain open with nothing on the same to obstruct the view from the house of the said Guernsey or Charles H. Cross, who is interested in said trade. And said Guernsey and Cross are to have the privilege of putting on said land a side-walk three feet wide across said land next to said Cross line and using and repairing the same at all times. Said Guernsey is to put into the end of the house where she finishes it off three of the windows, two in the first story and one in the second story."

On the same day Guernsey conveyed to the orator by deed the right to use the side-walk referred to; on June 11, 1889, conveyed to him his house, and Sept. 25, 1889, the administrator of Brooks conveyed to the defendant the Brooks house.

After the making of the deed of Aug. 4, the ell was taken away and the land graded to the satisfaction of Mrs. Brooks. It remained in this condition until shortly before the bringing of this suit when the defendant, who had then become the owner of the Brooks premises, made an excavation about three feet deep extending near the street side-walk and also the side-walk from the street to the Guernsey house.

In answer to the orator's request for a finding that this was a nuisance, the master found :

"The master inspected the premises and reports that it is

desirable to the owners of the orator's property, both that originally owned by him and that purchased of Miss Guernsey, that this land should be restored to its former grade; that the excavation is a detriment to the property of the orator, in that it is unpleasant to have this excavation near to both the orator's houses and to the walks; that any person owning or residing in either of orator's houses would very much prefer to have that ground as left by the orator, Miss Guernsey and Brooks, rather then as left by defendant after making the excavation. To have that land fall away to the depth that it now does from the walks is objectionable, but does not destroy the walks or prevent their use, or does not, as claimed by the orator, render their use dangerous. To have water stand upon the ground there is unpleasant to the owners or occupants of those two houses. The digging of this excavation makes an unpleasant outlook from orator's two tenements. In consequence of this excavation the orator was compelled to make some repairs upon this cross-walk to keep it in place, the land having caved away from it a little."

John H. Senter, for the orator.

Deeds are to be construed according to the evident intent of the parties, and most strongly against the grantor. *Flagg* v. *Eames*, 40 Vt. 22; *Collins* v. *Lavelle*, 44 Vt. 230; *Colby* v. *Colby*, 28 Vt. 10; *State* v. *Trask*, 6 Vt. 355; Dev. Deeds, ss. 836, 837, 839, 842, 843, 851, 882; *Hancock* v. *Watson*, 18 Cal. 137 Dev. Deeds, s. 848 Wash. Ease., 46; *Thurston* v. *Mink*, 32 Md. 487.

This excavation was a nuisance. Wood Nuis. s. 1.

2. Burr. Dict., 33.

J. A. & John G. Wing, for the defendant.

There was no nuisance. 6 Law. Rights Rem. & Pr. ss 2959, 2961; *Curtis* v. *Winslow*, 38 Vt. 690.

The opinion of the court was delivered by

MUNSON, J. The orator seeks by this bill to have the grade of the lot therein described restored to the condition it was in before certain excavations were made by the defendant. His claim stands upon the construction of a deed by which the owner of the lot placed himself under certain restrictions as to

its use. The clause principally relied upon is one which provides that the grantor shall not put "any buildings, timbers, trees, or other nuisances on said land."

It is a general rule that when words of particular designation are followed by an expression of general import, the latter can be held to include only things similar in character to those specially named. *Brainerd* v. *Peck*, 34 Vt. 496; *Parks' Admr.* v. *American Home Missionery Soc.*, 62 Vt. 19; *Re Barre Water Co.*, 62 Vt. 27. If this rule governs the construction of the clause quoted, the phrase "other nuisances" cannot be made to include a lowering of the surface; for the things named are only such as are placed upon and raised above the surface. We think the scope of the phrase must be restricted in accordance with this rule, unless its use in a more comprehensive sense is apparent from the instrument as a whole.

But when all the provisions of the deed are taken together, and considered in the light of the circumstances which surrounded the transaction, we see nothing that indicates an intention to guard against a lowering of the surface. The purchase was made to secure the removal of a part of a building which entirely obstructed the street view of the Guernsey house, and impaired that of the Cross house. The clause above quoted is followed by a provision that the land shall always remain open, with nothing upon it to obstruct the view. We think the purpose of the first clause was in line with that directly expressed in the second, and that an unobstructed surface was the thing intended to be secured.

This view is further supported by the provision made for determining the original grade. The place was to be filled to the satisfaction of the owner of the land. If Mrs. Brooks had then insisted upon the grade now established, the orator would have been without remedy. In view of the orator's having accepted stipulations which left the original grade to be determined by the other party, he cannot now well claim that it was the purpose of the deed to secure the permanent preservation of the most

desirable grade. We think the grading reported by the master is not an injury which the deed entitles the orator to complain of.

Decree affirmed and cause remanded.

Taft, J., did not sit, being absent.

GEORGE S. AND N. P. WHEELER *v.* SCHOOL DISTRICT NO. 13 IN BARRE.

Selling of land for school purposes. Constructive possession. Adverse occupation. Title in ejectment.

1. Under the statutes in force in 1850 the selectmen of a town had no authority to set off private land for a school house lot and award the owner damages therefor, and a writing purporting to be such a set-off is not admissible as evidence upon the question to the title to such lot.

2. If a grantor includes in a warranty deed premises to which he has no title, the grantee takes thereby only so much as is covered by the title of his grantor; nor will he acquire by the occupancy of that portion to which his grantor's title extends any title to the balance, so long as that is in the adverse possession of another.

3. *Held*, that upon the facts in this case the plaintiffs had no title upon which they could maintain ejectment against the defendant.

Ejectment. Trial by court at the March term, 1891, Washington county, Munson, J., presiding. Judgment for the plaintiff. The defendant excepts.

The court found the following facts :

"July 13, 1850, the selectmen of Barre executed a certain writing, purporting to be a set-off of a parcel of land therein described, which writing was recorded in the land records of Barre, Nov. 20, 1850. This writing contains a recital that the selectmen have 'been called upon by the prudential committee of school district No. 13 in said Barre to set off and appraise land belonging to Silas Harrington's heirs, for the permanent location of a school house in said district;' and concludes as follows: 'The above described premises, with the privileges of a district school house thereon, we have appraised at fifteen dollars current money, and the said school district No. 13 shall pay or cause to be paid the above named sum to the said Harrington heirs, or their agent, for said land, or this instrument is void.'"

This writing, marked Plaintiff's Exhibit 1 and attached hereto, was offered by plaintiffs, was objected to by defendant as unauthorized by statute and irrelevant, and was received subject to defendant's exception.

The plaintiffs also introduced a certified copy of the record of a division of the real estate of Nathan Harrington, deceased, among his heirs, duly recorded in the land records of Barre, from which it appears that a certain piece of ten acres therein described was set off to Silas Harrington. The division bears date Oct. 10, 1830, and said copy is hereto attached, marked Plaintiffs' Exhibit 2.

October 12, 1852, by deed of that date, a copy of which is attached hereto as Plaintiffs' Exhibit 3, Silas Harrington's administrator conveyed to Ira P. Harrington a piece containing six acres and ninety-six rods, which is in part described as "the same set-off to the said Silas Harrington from the estate of his father, Nathan Harrington, deceased, by the committee of division, Jan. 20, 1845."

November 24, 1883, Ira P. Harrington's administrator conveyed to the plaintiff by deed of that date, hereto attached and marked Plaintiffs' Exhibit 5, a piece said to contain about nine acres, and bounded by the highway and lands of certain owners named, the description concluding as follows: "Meaning to convey the lands within the above bounds, with the exception of what has been heretofore conveyed to school district No. 13 in said Barre." This deed covers the lot described in the previous deed, with the exception stated.

The plaintiffs also introduced, in connection with the above conveyances, certified copies of the licenses granted said administrators, which are attached hereto and marked respectively Plaintiffs' Exhibits 4 and 6.

The land described in the selectmen's set-off, Plaintiff's Exhibit 1, is not a part of the lot which was set off to Silas Harrington in the division of 1830, Plaintiff's Exhibit 2; but is a part of

the land covered by the deed from Silas Harrington's administrator to Ira P. Harrington, Plaintiffs' Exhibit 3.

The district building in question is upon the lot covered by the selectmen's set-off, and was standing upon it at the time of the set-off, and had been standing there for at least fifteen years. From a date not later than 1835 until 1889, it was occupied as a school house.

The piece set off by the selectmen is in the corner formed by the northerly and westerly lines of the piece from which it was taken. From the date of his deed in 1852, until his death some thirty years later, Ira P. Harrington had the exclusive possession of the lands on the easterly and southerly sides of the schoolhouse lot, claiming under his deed. No acts of actual possession within the lines of the schoolhouse lot, on the part of Ira P. Harrington, are shown. Neither does it appear that during this time the district had any possession of the lot other than for schoolhouse purposes.

In a district meeting held November 26, 1852, it was voted " to pay Ira P. Harrington $15 and interest, $2.17, it being for land the schoolhouse occupies. In a meeting held July 18, 1869, a committee was appointed 'to settle or confer with I. P. Harrington on land damages.' In a meeting held March 25, 1873, a committee was appointed 'to settle with I. P. Harrington for the land the schoolhouse stands on.' "

The records of these votes were offered by the plaintiffs as showing a recognition by the district of the title under which it claimed the land, and their admission for that purpose was objected to by defendant, and they were received in evidence under the defendant's exception.

The defendant afterwards offered the entire records of warnings and proceedings of the several meetings above named, and also the records of the warning and proceedings of the meeting of February 28, 1853, and of all adjournments of that meet-

ing; and the records so offered were received in evidence, and are referred to.

There is nothing in the records to show that any action was taken by the committees appointed as above stated. In 1871 Ira P. Harrington refused to pay his district tax on the ground that the district was owing him for the land, and the tax remained unpaid until the period of limitation had run. It appears from testimony of H. F. Woodward, to the admission of which plaintiffs excepted, that in 1873 he found in the record book delivered to him as clerk by Ira P. Harrington, who was his predecessor in that office, a receipt for $15 over the name of Ira P. Harrington; that he showed this to Harrington who denied that he had had the $15 or signed the paper; that he informed the officers of the district of the receipt, and showed it to J. N. Wilson, one of the committee appointed to settle with Harrington, and that after this he knew nothing of anything being done about it. Nothing further appeared in regard to the receipt. We find, mainly from the testimony above recited, that Ira P. Harrington was at some time paid the amount awarded by the selectmen. If the above testimony is inadmissible, the fact of payment is not established by the testimony.

Previous to 1890, the district had purchased a piece of land adjoining the old lot, on the other side of the road, and had commenced the erection of a school building thereon. At a district meeting held February 24, 1890, it was voted to accept the new school house, and to repair and rent the old school house. In pursuance of the latter action, the benches of the old house were removed and the space divided into rooms suitable for the occupancy of a family, by the erection of matched-board partitions; and the building was thereupon rented for, and has since been occupied as a dwelling house. It was the purpose to fully provide for the needs of the district in the erection of the new building and to make no further use of the old building for

school purposes. No intention to again use the old building for school purposes existed at the time the suit was brought.

At the above meeting of February 24, 1890, it was "voted to carry water from the old school grounds for school purposes." At a meeting held June 24, 1890, it was "voted to instruct Allen Bates to bring water from the old school grounds to the new school grounds for school purposes." Shortly after this, a well was sunk on the old grounds and a pipe laid to convey the water to the new grounds. The water ran in this nearly through the summer, but did not run the following winter.

In the spring of 1890, earth was taken from the old school grounds by the officers of the district and used in grading around the new school house.

In 1888, a line of railroad was located across one corner of the old ground and $25 land damages were paid to the district.

From the time the plaintiffs took their deed, they had the same possession before had by their grantor as above stated, and were in such possession at the time this suit was brought.

R. M. Harvey, and *Martin & Carleton*, for the defendant.

The selectmen had no authority to make the set-off. Com. Stat. ss. 37, 38.

The deed from Harrington's administrator expressly excepts this school lot; hence the plaintiffs can claim no title under that deed. *Singleton* v. *School Dist.* No. 34, 10 S. W. 793; *Coles* v. *York*, 36 Minn. 388.

The plaintiffs have gained nothing by adverse possession for the premises have been actually occupied by the defendant. *Jakeway* v. *Barrett*, 38 Vt. 323; *Hodges* v. *Eddy*, 38 Vt. 346; *Morse* v. *Churchill*, 41 Vt. 652; *Knight* v. *Heaton*, 22 Vt. 481; *Plimpton* v. *Converse*, 42 Vt. 712; *Davis* v. *White*, 27 Vt. 751; 3 Wash. R. P., 162; *Saugatuc* v. *East Saugatuc*, 1 N. E. Rep., 361 (Conn); *Daniels* v. *Gaulala Mills Co.*, 77 Cal. 300; *Austin* v. *Bailey*, 37 Vt. 223; *Arbuckle* v. *Ward*, 29 Vt. 53;

Perrin v. *Garfield*, 37 Vt. 310; *Grimes* v. *Regland*, 28 Ga. 123; *Stevens* v. *Hollister*, 18 Vt. 294.

Upon the contrary the defendant has acquired title by such possession. *Hodges* v. *Eddy*, 41 Vt. 485; *Watkins* v. *Peck*, 13 N. H. 360; *Austin* v. *Bailey*, 37 Vt. 223; *Winthrop School Dist.* v. *Benson*, 31 Me. 384; *Norris* v. *Beatty*, 5 Cal. 249; *Frick* v. *Sinon*, 75 Cal. 215; *Sherman* v. *Cane*, 86 N. Y. 57; *Hoffman* v. *White*, (Ala.) 7 South. Rep. 816; *Echols* v. *Hubbard*, Id., 817; *Mc Whorter* v. *Hetzel*, 24 N. E. (Ind.) 743.

J. A. & J. G. Wing, and *Barney & Hoar*, for the plaintiffs.

If the defendant acquired any interest in this land it was only an easement, which ceased to exist when the district ceased to use it for school purposes, and the title then reverted to the plaintiffs. 7 Law. Act., Def. and Pr. 3891–2; *Jackson* v. *Vt. Central Rd.*, 25 Vt. 150–158; *Williams* v. *School Dist. No. 6*, 33 Vt. 171, 181,–2; *Hill* v. *Railroad*, 32 Vt. 68, 77; *Brainard* v. *Clapp*, 10 Cush., 6, 9, 10; *Crosby* v. *Dracut*, 109 Mass. 206; *Platt* v. *Penn. Co.*, 43 Ohio 228; *Graham* v. *Cal. Rd.*, 36 Ind. 463; *Pierce* v. *B. & L. Rd.*, 141 Mass. 481; *Greeley* v. *M. & S. S. Rd.*, 30 Minn. 541.

The opinion of the court was delivered by

START, J. This is an action of ejectment. To sustain it, the plaintiffs rely upon title and right of possession. For the purpose of showing title, they introduced in evidence a certified copy of the record of a division of the real estate of Nathan Harrington, deceased, among his heirs. It appears from this record that a piece of land containing ten acres was set-off to Silas Harrington.

The plaintiffs also introduced in evidence, subject to the defendant's exception, a writing signed by the selectmen of the town of Barre, dated July 15, 1850, and recorded in the records of Barre, purporting to set off the school lot in question to the defendant. This writing, by its terms, was to be void, unless

the defendant should pay to the heirs of Silas Harrington fifteen dollars. In 1852, Silas Harrington's administrator conveyed to the plaintiffs' grantor, Ira P. Harrington, about six acres of land, described in part as the same land set off to Silas Harrington as aforesaid. In 1883, Ira P. Harrington's administrator conveyed to the plaintiffs the same land, excepting therefrom what had theretofore been conveyed to the defendant. The plaintiffs claim title to the demanded premises under this deed. It does not appear that Nathan Harrington ever had title to, or right of possession of, the school lot. It appears that the school lot is not a part of the lot set off to Silas Harrington. The selectmen of the town of Barre had no authority to set off land to the defendant. There was no statute then in force authorizing them so to do; and, the pretended set-off being void, the writing should have been excluded. From the records and facts found in relation to Silas Harrington's title, we hold that he did not have title to, or right of possession of, the demanded premises at the time of his decease. The school lot is within the boundaries contained in the deed from Silas Harrington's administrator to Ira P. Harrington, but this did not give Ira P. Harrington title thereto.

As before stated, Silas Harrington did not have title to the lot at the time of his decease; he having no title, his administrator could not convey the lot by including it in the boundaries contained in his deed. *Bank of Middlebury* v. *Rutland*, 33 Vt. 414.

Ira P. Harrington did not have title to the lot at the time of his decease, unless he acquired it subsequently to the date of the deed from Silas Harrington's administrator to him, by adverse possession. He occupied the lands southerly and easterly of the school lot for thirty years under his deed from Silas Harrington's administrator; and, during all this time, he exercised no acts of possession within the limits of the school lot, nor claimed title or right of possession under his deed, nor questioned the defendant's title thereto. It does not appear that the school lot

was ever a part of the lots occupied by him, but it does appear that it is not a part of the land owned by his grantor. The school lot was in the undisputed possession of the defendant for school purposes from some time prior to 1835 until 1889. The plaintiff's grantor excepted from his conveyance land theretofore deeded to the defendant. This exception clearly has reference to the lot in question, and indicates that the parties to the deed then understood that the lot had been conveyed by some one to the defendant. From these facts, we hold that Ira P. Harrington did not acquire title, and that the plaintiffs have neither title nor right of possession to the demanded premises.

The plaintiffs introduced in evidence, subjectto the defendant's exception, the district records, from which it appears, that, at a meeting held November 26, 1852, the district voted to pay Ira P. Harrington fifteen dollars for land occupied for a school house; and that, at subsequent meetings held in 1869 and 1873, committees were appointed to settle, or confer, with Ira P. Harrington on land damages. Why this action was taken does not appear. It does not appear that Harrington was claiming that he owned the lot, nor that he was claiming pay for it, unless such fact is inferable from the circumstance that he refused to pay his school tax in 1871 on the ground that the defendant was owing him for the land. The defendant at this time had been in the uninterrupted possession of the lot for more than thirty-five years. After such uninterrupted possession, it will not be presumed, from this action of the defendant and claim by Harrington, that the defendant did not have title to the lot, nor that the title was in Harrington.

The plaintiffs' failure to show title, or any acts of possession by them or those under whom they claim, renders it unnecessary to consider further the effect of the action thus taken by the defendant, or to decide the questions relating to the defendant's title or the character of the occupancy of the lot. The defend-

ant's possession is itself sufficient against the plaintiffs and all other persons except the true owners.

Judgment reversed and judgment for the defendant.

Ross, Ch. J., doubting.

Re ROBERT T. PARSON'S EST.; CATHERINE M. DAVIS, Appellant, PARSONS *et al.*, Appellees.

Committee to divide estate of deceased person. R. L. s. 2259. Direction of statute must be followed.

1. A committee appointed by the Probate Court to make partition of the real estate of a deceased person, must act strictly within the statute or their proceedings will be void.
2. Where the estate of the decedent lies in common with other real estate, it is the duty of the committee to first sever the estate which they are to divide from that with which it lies in common, R. L. s. 2259; and the fact that all the parties in interest request them to proceed otherwise, will not justify the committee in departing from the direction of the statute. If they do, their report can have no effect as a decree of the Probate Court, however it may stand as an award of arbitrators.

Appeal from an order of the Probate Court for the district of Fair Haven. Heard at the March term, 1890, Rutland county, Taft, J., presiding, upon a motion to dismiss the appeal and a demurrer to the plea in bar. *Pro forma*, the motion was overruled, and the demurrer sustained.

The appellant excepts.

Geo. M. Fuller, for the appellant.

The decree of the Probate Court in this case would be conclusive against the appellant unless she appealed, hence she has such an interest as entitles her to an appeal. *Adams* v. *Adams*, 22 Vt. 50; *Boyden* v. *Ward*, 38 Vt. 628; *Ball* v. *Nichols*, 15 Vt. 329; Freeman Judg. s. 319; R. L. s. 2270.

And this is true although the act of the Probate Court was void. *Shumway* v. *Shumway*, 2 Vt. 339.

The alleged agreement of the appellant as to the partion of this real estate cannot be shown by parol. *Buck* v. *Kettles*, 49 Vt. 288; Brown St. Fr., s. 263; *Hodgers* v. *Eddy*, 41 Vt. 485.

John Howe and *H. A. Harman*, for the defendant.

The committee in making partition must follow the statute strictly. *Collamer* v. *Hutchens*, 27 Vt. 733; *Cox* v. *Ingleston*, 30 Vt. 258.

They should have severed the lands belonging to the estate which lay in common. R. L. s. 2259.

The action of the committee was illegal unless assented to by the appellant. *Oram* v. *Young*, 18 N. J. Law 54; *Cox* v. *Ingleston*, 30 Vt. 258; *Camp* v. *Camp*, 59 Vt. 667.

But these tenents in common might make partition among themselves, or agree that the committee should do so for them, and such an agreement need not be in writing. *Price* v. *Weaver*, 13 Gray 272; *Walker* v. *Richards*, 39 N. H. 259; *Mellow* v. *Reed*, 114 Pa. St. 649; *McKnight* v. *Bell*, 135 Pa. St. 358.

The opinion of the court was delivered by

THOMPSON, J. This is an appeal from the judgment of the Probate Court for the district of Fair Haven, accepting and approving the report of the committee appointed by said court to divide and make partition of the real estate of Robert T. Parsons late of Castleton in said district, deceased, to and among the persons entitled thereto. A part of this real estate lay in common and undivided with other real estate vested in the heirs of the late John C. Parsons, as tenents in common, of whom the said Robert T. Parsons was one. The heirs and representatives of the two estates are not identical. The appellant, Catherine M. Davis, is not an heir of Robert T. Parsons, but is an heir of said John C. Parsons, and one of the owners, as tenant in common, of the real estate vested in his heirs. It was the duty of the committee to first divide and sever the estate of Robert T. Par-

sons, from the estate with which it lay in common. R. L. s. 2259. The committee in their report to the Probate Court say: "This course appeared so prejudicial to all concerned that it was unanimously desired by all in interest, and it was so agreed, that we in some way divide and distribute the real estate of both these estates among the heirs thereto, according to their respective interests in each. We were then confronted by a claim of John Parsons to about forty-three acres near the center of the original home farm of John C. Parsons, based upon a parol agreement with said John C. Parsons followed by fifteen years adverse possession. This was submitted by the agreement of all the parties to us for examination and decision. Three days were spent in hearing the evidence and arguments of counsel. In our judgment the claimant failed to establish a title to the premises by adverse possession and we so adjudged the matter." It further appears from their report that the committee, without severing the real estate of the two estates lying in common, proceeded to make partition of the real estate belonging to the estate of Robert T. Parsons and to the heirs of John C. Parsons, among some of the heirs of the respective estates, in such manner as the committee in their judgment deemed equitable. They did not, however, divide and partition any of the real estate belonging either to the estate of Robert T. Parsons or to the heirs of John C. Parsons, to the appellant, but they divided and partitioned her share of the real estate vested in the heirs of John C. Parsons, to one Richard H. Walker upon the condition that he pay to her the sum of $111.75.

It thus appears that the committee did not attempt to act under the authority of their appointment by the Probate Court, but wholly under the alleged agreement of the parties constituting them arbitrators in respect to the matters named. Their so-called report is therefore simply their award in the premises. The Probate Court had no power by statute to permit such a reference or submission, nor to ratify it by confirming the award

when made under it. In short the Probate Court had no jurisdiction in respect to the alleged submission or award, and its judgment accepting and approving the award is void. If the award has any effect between the parties, which we have no occasion to decide, it must rest solely upon their agreement to submit, and the action of the arbitrators as such. The Probate Court having no jurisdiction in this matter, the County Court had none, and the appeal should have been dismissed for want of jurisdiction. R. L. s. 2268.

This view of the case renders it unnecessary to consider the so-called plea in bar and demurrer thereto.

Judgment reversed. Cause dismissed for want of jurisdiction. Judgment to be certified to Probate Court.

THOMAS J. BAKER, APLT., *v.* JOSEPH JACOBS.

Treating jurors. Tobacco is within R. L. 997. Construction of statutes.

1. Whether or not tobacco be "victuals or drink," (in the opinion of Taft, J , it is both) the furnishing of it to a juryman by way of treat is within the purview of R. L. s. 997; and if a party after trial in the County Court assembles the jurors and pays the cigars, a verdict in his favor will be set aside.
2. In construing a statute the trend of previous legislation upon the same subject-matter may be considered to ascertain the intent of the legislature.

Assumpsit. Trial by jury at the December term, 1890, Lamoille county, Ross, J., presiding. Verdict for the plaintiff. After verdict the defendant moved to set aside the same. The court granted the motion as a matter of law and not discretion. The plaintiff excepts.

The case appears in the opinion.

P. K. Gleed, for the plaintiff.

This case must be judged by the ordinary customs of the time and place. Giving a friend a cigar in these last days is by common custom as usual, as harmless and commendable as was once the giving of a cup of cold water. One of Vermont's greatest statesmen has been often censured because he so seldom conformed to this universal social custom.

What if the plaintiff had furnished the jury a drink of water, or a pinch of snuff, a clove, or a tooth-pick? Would that have set aside the verdict?

Must it be said that this court by solemn and deliberate adjudication, from which neither exception or appeal can be taken,

has decreed that tobacco is victuals? "Tell it not in Gath, publish not in the streets of Askalon," lest the sons of the Connecticut valley rejoice, and the daughters of Virginia be glad. When the anxious mother asks her foolish son what causes that projection in his thin and sallow cheek, she is met with the truthful answer—"victuals."

When the sacred atmosphere of the church is polluted with the stench that steams up from every smoker's clothes and hair and breath, the lady who is compelled to hold her scented handkerchief to her nose all through the service to keep her stomach in submission, must be reminded that it is only the lingering aroma of a delicate breakfast. Tobacco is victuals.

Clearly this verdict was not influenced by the act complained of; it was an act of ordinary custom and usual hospitality; it is in itself exceedingly diminutive and insignificant; and to sustain the motion would do much more harm to the public and damage even to the moving party than could be done by ending the litigation and sustaining the verdict.

E. B. Sawyer, for the defendant.

This is not a penal statute, and not therefore subject to the strict rules of construction applicable to such statutes. 4 Am. & Eng. Enc. Law, 643.

The true question is, what was the intention of the legislature? In determining that it is proper to look into the statutes of which this is a re-enactment. An examination of these shows that the vice aimed at was the "*treating*" of jurors by parties. It is immaterial whether the treating is with wine or cigars. Slade's Com. p. 78; 1 Am. & Eng. Enc. Law, 385; Bou. Law Dict., 347; 1 Story Com. Bk. 3, Chap. 6.

Tobacco is both victuals and drink, according to the definitions of Webster, Worcester and the Century Dictionary.

The opinion of the court was delivered by

Thomas J. Baker, Aplt. *v.* Joseph Jacobs.

THOMPSON, J. In the County Court, the jury returned a verdict for the plaintiff. Immediately after the verdict was returned the plaintiff directed the deputy sheriff who had had charge of the jury, to get them all together at the American House in Hyde Park, saying that he wanted "to pay the cigars." Thereupon the deputy sheriff informed some of the jury that the plaintiff was going to treat, and several of the jury soon after met the plaintiff at the American House and were treated by him with cigars furnished and paid for by him. At the same term the verdict was rendered, the defendant moved to set it aside on account of the plaintiff's having thus furnished several of the jurors with cigars by way of treat. The facts not being contradicted, the County Court held as a matter of law, and not as a matter of discretion that the case was within R. L. s. 997, and set the verdict aside and granted a new trial, to which holding of the court the plaintiff excepted.

By R. L. s. 997 it is provided that "if a party obtaining a verdict in his favor, shall during the term of the court in which such verdict is obtained, give to any of the jurors in the cause, knowing him to be such, any victuals or drink, or procure the same to be done, by way of treat, either before or after such verdict, on proof thereof being made, the verdict shall be set aside and a new trial granted." The determination of this case depends upon the construction to be given to this section. In ascertaining the intent of the legislature in enacting R. L. s. 997, we are aided by the trend of previous legislation on this subject. The first act relating to it was passed Nov. 1, 1791, and was entitled, "an act to prevent undue influencing of jurors," and was as follows:

"Whereas, the very pernicious practice of treating jurors by parties in litigation before the courts of law within this State, has become prevalent by the party recovering, which tends much to the corruption of the manners of the jurors, and is often subversive of justice by giving an undue bias:

Therefore to prevent such evil practices in the future, it is

hereby enacted by the general assembly of the State of Vermont, that if any person obtaining a verdict in his favor in any court in this State, shall during the session of the said court in which such verdict is obtained, give to any of the jurors in said cause, knowing him or them to be such, any victuals or drink, or procure the same to be done, by way of treat, whether before or after such verdict, on due proof thereof being made, it shall be sufficient reason for arrest of judgment in said cause."

By an act passed March 2, 1797, the provisions of this act of Nov. 1, 1791, were re-enacted in the same words with the exception of the change that such treating, "shall be sufficient reason to set aside the verdict and award a new trial in such cause," (Tolman's Comp. p. 82, s. 71) and this continued to be the law until the enactment of R. L. s. 997, in 1880. We thus see that the constant tendency of our legislation on this subject has been to make the law more stringent against the evil sought to be remedied by the act of Nov. 1, 1791, and more efficient to suppress it. It is contended on the part of the plaintiff that cigars do not come within the meaning of "victuals or drink" as used in R. L. s. 997, and hence the treating of the jury by the plaintiff with cigars is not within the prohibition of the law. We do not deem it necessary to decide whether tobacco falls within the strict meaning of the terms "victuals or drink," as has been ingeniously argued by the defendant's counsel. In construing a statute of this kind, as was said in *Ryegate* v. *Wardsboro*, 30 Vt. 746, we are to "look to the whole and every part of a statute, and the apparent intention derived from the whole, to the subject, to the effects and consequences, and to the reason and spirit of the law, and thus ascertain the true meaning of the legislature, though the meaning so ascertained conflict with the literal sense of the word." In that case the court quoted with approval from an old book the following summary of the rules of construing statutes: "In some cases the letter of an act of parliament is restrained by an equitable construction; in others it is enlarged; in others the *construction is contrary to the letter*. In order to

form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law maker present, and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he being an upright and reasonable man would have given. If this be, that he did mean to comprehend it, you may safely hold the case to be within the equity of the statutes; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto." We think the rule thus laid down in *Ryegate* v. *Wardsboro* is the true rule of construction to be adopted in this case. The evil, against which the legislature has sought to guard and has intended to suppress from its earliest enactment on this subject to the present time, has been to prevent jurors from being biased by being treated by a party to the suit before rendering their verdict or by the hope or expectation of being treated after they should render it, and to prevent a suitor from directly or indirectly seeking to influence a verdict in his favor by such means. This has been the policy of our law for a century, and we think the furnishing a juror with a cigar by way of treat is as much within the true intent and spirit of the statute as the treating him with a glass of whiskey. Indeed, among a large class of people, in treating, cigars are now given and received instead of intoxicating liquors. We hold that the treating of the jurors by the plaintiff as stated, was clearly within the provisions of R. L. s. 997, and that as a matter of law the court below was bound to set aside the verdict and grant a new trial.

Judgment affirmed and cause remanded for a new trial.

TAFT J. I concur in the result but not for the reason stated. When the act under which we are asked to affirm the judgment was passed in 1791, to drink tobacco was a common phrase. It was used in that sense by the best authors, like Spenser, Dryden, Pope and rare Ben. Johnson. Webster says, to drink is "to absorb" "to take in". Do you not often meet

men who have absorbed and taken in so much tobacco that you can scent them as far as the hound can the fox? According to these definitions they drink it. He says "to smoke as tobacco" is now obsolete, but I do not think it was when the act in question was passed, and in construing a statute have we not the right to use the words thereof in the same sense in which they were used at the time of its enactment. I think we have. In 1620 George Wither wrote a poem on the weed, the refrain of which was

"Thus thinke then drinke tobacco."

From the discovery of the plant until this century the word was used in this sense.

Joaquin Miller says: "I drink the winds as drinking wine." If a man can drink wind I think he can drink tobacco smoke, vile and disgusting as it is. A man is compelled to drink it, by having it puffed in his face, on all occasions and in all places, from the cradle to the grave. It is a drink, and I would set aside the verdict for that reason.

H. G. BANISTER *v.* S. B. WAKEMAN.

Justice of the Peace. Judicial and ministerial acts. Malice.

1. A judge is not liable to a civil action for a judicial act, and a justice of the peace is a judge within the application of this rule.
2. The examination of witnesses, the admission or rejection of evidence, and the passing of sentence are all judicial acts.
3. A respondent in a criminal prosecution before a justice has an absolute right of appeal within two hours, and from the moment such appeal is taken the justice has no further jurisdiction in the premises.
4. His acts in making up the record and issuing a mittimus are ministerial acts for which an action will lie.
5. And if he has been actuated by malice, that may be considered by the jury upon the question of exemplary damages.

Action on the case. Heard at the February term, 1891, Orleans county, Tyler, J., presiding, upon general demurrer to the first count of the plaintiff's declaration. The demurrer was sustained *pro forma*, and the plaintiff excepted.

The first count, after alleging the issuing of a warrant by the defendant upon the complaint of a town grand juror, and the arrest and production of the plaintiff upon the same continued:

"And the plaintiff being then before said Wakeman, justice of the peace as aforesaid, the said Wakeman while then and there pretending to act as a justice of the peace in the trial of the plaintiff upon the charge contained in said complaint, also then and there acted as attorney for the State or for said grand juror, and as such attorney examined each and all the witnesses offered or called by said grand juror. And the plaintiff then and there during said trial before said Wakeman as such justice of the peace, moved, desired and requested of the said Wakeman, as such justice of the peace, to be permitted to introduce, and then and there offered to introduce, certain witnesses and evidence for the purpose of proving that

plaintiff was not guilty of the criminal offence charged against the plaintiff in said complaint, and the said Wakeman did then and there, contrary to his duty and oath as such justice of the peace, and with intent to injure the plaintiff, wilfully and maliciously refuse to hear any witnesses or evidence favorable to the plaintiff upon said trial, or any testimony offered by the said H. G. Banister. And the defendant having wilfully, and maliciously and illegally refused said request, did wilfully and maliciously and illegally convict the plaintiff of being guilty of said alleged criminal assault, of which the plaintiff was not guilty, and the defendant did then and there maliciously and wrongfully order and sentence the plaintiff to pay a fine of ten dollars to the treasurer of the town of Jay and the costs of said prosecution, taxed at eight dollars and nine cents, and to stand committed until sentence be complied with, and did then and there further order, after having determined that the costs of commitment would be twenty-five dollars, that in case said fine and costs should not be paid within twenty-four hours after the said 8th day of November, A. D., 1889, at 12 o'clock noon of said day, the said plaintiff should be confined at hard labor in the House of Correction at Rutland, in the county of Rutland, for the term of 129 days, to be computed from the day of commitment of the plaintiff to the keeper of said house of correction, or until he pay the balance of said fine and costs of commitment, taxed at twenty-five dollars, after deducting therefrom the sums of thirty-three and one-third cents for each day he will have been imprisoned or confined as aforesaid under said sentence or order. Which said unlawful and malicious sentence the plaintiff refused to comply with, and then and there on said 8th day of November, and within two hours after the rendition of said judgment, moved, asked for, and prayed the said Wakeman as such justice of the peace, for an appeal from his said judgment, to the next stated term of the county court to be holden at Newport, within and for said county of Orleans, on the first Tuesday of February, A. D., 1890. And then and there, within two hours from the rendition of said judgment the plaintiff offered and tendered to said Justice of the Peace, twenty-five cents in good and lawful money, for said defendant's fees on the granting of said appeal, and then and there within two hours after the rendition of said judgment, the plaintiff offered to furnish before said Justice, and did then and there have before said Justice, ready to enter into recognizance, good and sufficient surety bail that the plaintiff should personally appear before said county court and prosecute his appeal from said judgment of the defendant, as

such Justice of the Peace, and abide the order or sentence of said county court thereon. And the said defendant, S. B. Wakeman, then and there wrongfully, knowingly, and maliciously and contrary to his duty and oath as a Justice of the Peace and with intent to injure the plaintiff, refused to grant the plaintiff an appeal from the said judgment of the said defendant as Justice of the Peace, and there and then committed the body of the plaintiff into the custody of said deputy sheriff for safe keeping until the plaintiff should pay said fine and costs or a mittimus should be made and delivered to said deputy sheriff."

And the said defendant did then and there, after having refused to grant an appeal to plaintiff as aforesaid, to wit; on the 8th day of November A. D. 1889, at said Jay, maliciously and wrongfully and with the intent to injure the plaintiff issue his warrant of mittimus under his hand, as such justice of the peace, directed to any sheriff or constable in the State, therein and thereby commanding any sheriff or constable in the State of Vermont to commit the body of the plaintiff, the said H. G. Banister, to the keeper of the House of Correction in Rutland, in the county of Rutland within the said House of Correction, who was thereby and therein commanded to receive the plaintiff, the said H. G. Banister, and him employ at hard labor in said House of Correction, for the full term of 129 days or until he should be sooner discharged according to law. And dated his said mittimus, at said Jay, the 8th day of November, A. D. 1889. And said mittimus was then and there delivered to the said J. W. Sheldon, deputy sheriff as aforesaid."

The count then alleged that the plaintiff was arrested upon this mittimus, and subsequently released upon *habeas corpus*.

Crane & Alfred, for the defendant.

A justice sitting as a trial court, may properly examine the witnesses produced before him. Whar. Cr. Ev., s. 452.

A justice is not liable to a private action for acts within his jurisdiction. *Gwinne* v. *Pool*, Lutg. 290; *Raymond* v. *Bolles*, 11 Cush., 315, 317; *Allec* v. *Reece*, 39 Fed. Rep. 341; *Bradley*

v. *Fisher*, 13 Wall., 335; *Yates* v. *Lansing*, 5 Johns. 282; *Lange* v. *Benedict*, 73 N. Y. 12; *Pratt* v. *Gardner*, 2 Cush. 63; *Kelley* v. *Dresser*, 1 Allen 31.

The issuing of a mittimus is a part of the trial and a judicial act. *Hammond* v. *Dresser*, 1 Mod., 184; *Drowning* v. *Herrick*, 47 Me., 462; *Evans* v. *Foster*, 1 N. H. 374; *Kibliny* v. *Clark*, 53 Vt. 379, per Ross, J., p. 383-4; *Morse* v. *White*, 139 Mass. 162, per Morton C. J. 163; *Cooke* v. *Bangs*, 31 Fed. Rep. 640.

To take recognizance or bail is a judicial act. *Chickering* v. *Robinson*, 3 Cush. 543; *Way* v. *Townsend*, 4 Allen, 114; *Linford* v. *Fitzroy*, 13 Ad. & Ell. N. S. 240.

So is the granting or refusing of an appeal. *Jordan* v. *Hanson*, 49 N. H. 199; *State* v. *Towle*, 42 N. H. 540; *Tichenor* v. *Hewson*, 14 N. J. L. 26.

If a judge acts maliciously and corruptly he is not liable to a private action until he has been first impeached. *Taylor* v. *Dorennus*, 16 N. J. L. 476; *Maynold* v. *Thorpe*, 33 N. J. L. 134; *Cunningham* v. *Bucklin*, 8 Cowen, 178; *Kress et al.* v. *State, ex rel. Wagoner*, 65 Ind. 106; *Fausler* v. *Parsons*, 6 West Va. 486; *Stewart* v. *Cooley*, 23 Minn. 347; *Jones* v. *Brown*, 54 Iowa, 74; *Scott* v. *Stanfield*, 3 L. R. Exch. 220.

Dickerman & Young, for the plaintiff.

The plaintiff had an absolute right to appeal from the judgment of the justice within two hours, and when that was done the cause passed from the jurisdiction of the justice. Sec. 1673 R. L.; *Re* Kennedy, 55 Vt. 1.

The subsequent issuing of the mittimus was a ministerial act for which the defendant is liable. *Kendall* v. *Powers*, 4 Met. 533; *Briggs* v. *Wardwell*, 10 Mass. 356; *Whipple* v. *Kent et al.*, 2 Gray, 410; *Morrill* v. *Thurston*, 46 Vt. 732; *Vermont Mutual Fire Insurance Co.* v. *Cummings*, 11 Vt. 503; *Kelley* v. *Bemis*, 4 Gray 83; 2 Hil. Torts, pp. 172, 186; *Daggett* v. *Cook*,

11 Cush. 262; Add. Torts, s. 964, and notes; *Jones* v. *Elliott et al.*, 35 Me. 137.

Refusing the plaintiff his right of appeal was a ministerial act. *Tyler* v. *Alford*, 38 Me. 532; *Tompkins* v. *Sands*, 8 Wend. 462; *Houghton* v. *Swarthout*, 1 Denio 589.

The issuing of an execution is ministerial. *Noxon* v. *Hill*, 2 Allen 215; *Blanchard et al.* v. *Waters*, 10 Met. 187; *Fisher v. Dean*, 107 Mass. 118; *Abee* v. *Ward*, 8 Mass. 84; *Sullivan* v. *Jones*, 2 Gray, 570; *Aiken* v. *Richardson*, 15 Vt. 500; *Longe* v. *Benedict*, 73 N. Y. 36; *Spencer* v. *Perry*, 17 Me. 413.

In issuing the mittimus the defendant acted without jurisdiction and is liable. Add. Torts, Sec. 1020, 965; *Piper* v. *Pearsons*, 2 Gray, 120; *Vaughn* v. *Congden*, 56 Vt. 111; *Wright* v. *Hazen & Gordon*, 24 Vt. 143; *Leary v. Patrick*, 69 E. C. L. 266; *Clark* v. *May*, 2 Gray 410.

The opinion of the court was delivered by

THOMPSON, J. In the criminal prosecution against the plaintiff instituted before the defendant as a justice of the peace, he had jurisdiction of the person of the plaintiff, of the offense charged and of the process issued to apprehend the plaintiff, by which he was brought before the justice to answer to the alleged assault and battery. Having at the outset jurisdiction of the subject matter, the person and the original process, it is insisted by the defendant that all his subsequent acts as alleged and complained of in the plaintiff's declaration and admitted by the demurrer, were done by him while acting in a judicial capacity, and that consequently he is not answerable therefor in a civil action.

A judicial officer, acting within his jurisdiction and in a judicial capacity, is not liable in a private action for his judicial acts. In this respect a justice of the peace has the same immunity as a judge of the Supreme Court. *Pratt* v. *Gardner*, 2 Cush 63; *Yates* v. *Lansing*, 9 Johns. 395 (6 Am. Dec. 290 and note); *Randall* v. *Brigham*, 7 Wall. 523 (L. Ed. Book 19, 285);

Bradley v. *Fisher*, 13 Wall. 335 (L. Ed. Book 20, 646); *Lange* v. *Benedict*, 73 N. Y. 12 (29 Am. Rep. 80); *Floyd* v. *Barker*, 12 Coke 24; *Scott* v. *Stanfield*, L. R. 3 Ex. 220; *Munster* v. *Lamb*, 28 Alb. Law Jour. 445 (49 L. T. Rep. [N. S.] 253.) The reason of this rule is well stated by Judge Powers in his dissenting opinion in *Vaughn* v. *Congdon*, 56 Vt. 111, where he says: "Immunity from liability in favor of the judges rests upon the broad ground of public policy, which declares that a judge, for acts done by him in his public capacity, *is absolutely privileged from action.* It is an official privilege, which, though it covers a multitude of sins, is still absolutely essential to the due administration of justice. It is a privilege not primarily designed for the protection of the judge, but for the *protection of the public*, by making the judges free, independent and fearless in the discharge of their duties. No judge could act independently if conscious that he was exposed to an action by every disappointed suitor in his court. If a judge were liable to action, then the question whether he has properly discharged his judicial duties must be submitted to jury to determine according to their notions. In like manner the judge trying his case could be sued, his conduct reviewed, and so on *ad infinitum*."

This exemption of judges from civil liability is not affected by the motives or intent with which their judicial acts are performed. The purity of their motives and conduct cannot in this way be made the subject of judicial inquiry. *Floyd* v. *Barker*, *Scott* v. *Stanfield*, *Bradley* v. *Fisher*, *Randall* v. *Brigham*, *Pratt* v. *Gardner*, *Munster* v. *Lamb*, *supra*. *Taylor* v. *Doremus*, 16 N. J. Law 473. In *Fray* v. *Blackburn*, 3 Best & S. 576, one of the judges of the Court of Queen's Bench was sued for a judicial act, and on demurrer, one point taken was that there was no allegation of malice. After argument, the plaintiff applied for leave to amend by introducing an allegation of malice and corruption, which leave was refused. In denying the motion the court said: "It is a principle of our law that no

action will lie against a judge of one of the Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harrassed by vexatious actions."

The defendant, as the justice holding the court before which the plaintiff was tried, had the right to interrogate the witnesses produced on trial. This is often done by the presiding judge in the County Court when deemed necessary to elicit the facts in issue or to prevent a miscarriage of justice. It is a matter which rests in the sound discretion of the court before which the trial is had, even to the extent of asking leading questions.

It is alleged that the defendant at the trial of the plaintiff excluded witnesses and rejected evidence offered by him. Whether the witnesses were competent or the evidence offered was relevent to the issue on trial, was a question clearly within the judicial power of the defendant as justice to determine, and he is not answerable for his decision excluding the same. In short, all the acts of the defendant to and including the sentence imposed upon the plaintiff, as alleged in the declaration, were such judicial acts that he cannot be made answerable for the same in a civil action.

R. L. s. 1673 provides that "the respondent may appeal from any judgment or sentence of a justice against him, if the appeal is claimed within two hours after the rendition of judgment." The plaintiff was entitled to an appeal to the County Court from the judgment and sentence of the defendant as justice, without offering or procuring bail for his appearance at the County Court. In *Re Kennedy*, 55 Vt. 1. It is admitted that the plaintiff asked for an appeal from the judgment and sentence of the justice within two hours after the rendition thereof. The

statute grants the appeal and it became operative by virtue of the statute when demanded and there was nothing left for the magistrate to do in respect to it, except to make the record showing that an appeal had been taken, which record is a mere ministerial act. 5 Bac. Abr. (Bouvier's Ed.) 401. He had no right nor power to refuse the appeal for it was not, on the conceded facts, an open question for him to pass upon.

When the plaintiff said "I appeal," the appeal was then taken and at once became operative to suspend the judgment and sentence of the justice, and his authority to issue a mittimus to carry his sentence into effect was at an end until after the adjournment of the court to which the appeal was taken, and even then his power to issue such mittimus would not be revived unless both the respondent and the prosecuting officer failed to enter the case in the appellate court. R. L. s. 1676.

It is argued that the issuing of the mittimus by the defendant was a judicial act. This contention is not sound. The issuing of mesne and final process in civil actions and of a mittimus of this kind in criminal proceedings is a ministerial act. The distinction between the judicial and ministerial powers and duties of justices of the peace, is well settled. As before stated, when acting in the former capacity and within the limits of the jurisdiction conferred upon them, they are exempted like judges of other courts from liability to answer elsewhere in private actions for their official orders, decrees and judgments. But they are responsible in civil suits to individuals for all damages arising from every illegal act they may have done in the exercise of their ministerial powers or in the discharge of their ministerial duties. A justice has no clerk for his court, but he acts as clerk as well as court. His court is a court of record. By R. L. s. 828 it is made the duty of every justice to keep a record of his judicial proceedings in civil and criminal cases. In issuing mesne and final process his duty and liability are the same as that of the clerk of any other court issuing like process. *Graham* v. *Todd*,

9 Vt. 166; *Insurance Co.* v. *Cummings*, 11 Vt. 503; *Albee* v. *Ward*, 8 Mass. 84; *Briggs* v. *Wardwell*, 10 Mass. 356; *Kendall* v. *Powers*, 4 Met. 553; *Blanchard* v. *Waters*, 10 Met. 185; *Sullivan* v. *Jones*, 2 Gray 570; *Noxon* v. *Hill*, 2 Allen 215; *Taylor* v. *Doremus*, 16 N. J. Law 473; *Allen* v. *Gray*, 11 Conn. 103; *Coltraine* v. *McCain*, 3 Dev. 308; *Jones* v. *Elliot*, 35 Maine, 137; *Tyler* v. *Alford*, 38 Maine 530; *Tompkins* v. *Sands*, 8 Wend. 462; (24 Am. Dec. 46 & Note); *Houghton* v. *Swarthout*, 1 Denio 589; *Hill* v. *Bateman*, 1 Strange 710.

The defendant is therefore liable for whatever damages were occasioned to the plaintiff by the unlawful issuing of the mittimus. If he issued it with the malicious and wrongful intent to injure the plaintiff, that is a fact for the jury to consider in deciding whether or not they will allow exemplary damages.

Judgment reversed, demurrer overruled, and the first count adjudged sufficient. Cause remanded with leave to plead.

EZRA WILLEY *v.* NATHAN R. CARPENTER.

General demurrer. Duplicity and argumentativeness. Neither words nor consent will justify an assault.

1. Duplicity and argumentativeness cannot be reached by general demurer, and a special demurrer must point out specifically wherein the duplicity or argumentativeness consist.
2. When a defendant relies upon a series of acts by the plaintiff in justification of an assault and battery, it is not duplicity to set out all these acts however multifarious they may be.
3. Where such acts are relied upon in justification it should be alleged that they have provoked the assault.
4. Mere words, however abusive or insulting, will not justify an assault and battery.
5. Nor is it a valid defence to a civil action for an assault and battery that the plaintiff consented thereto.

Trespass for assault and battery. Heard on demurrer to the defendant's second and third pleas at the December term, 1890, Ross, Ch. J., presiding. Demurrer sustained. Exceptions by the defendant, and cause passed to the Supreme Court before final judgment.

The defendant in his second plea alleged in substance that at various times and places the plaintiff had used concerning himself and wife abusive and insulting language with intent to induce an assault, and that finally, goaded to frenzy, he struck the plaintiff a single blow, which was the battery complained of.

The third plea was like the second except that it in addition alleged that the defendant was provoked to commit the assault by the conduct of the plaintiff, and that the plaintiff had entered upon this course of conduct wilfully with intent to provoke the

plaintiff to commit the assault in order that he might have an action against him.

Hunton & Stickney, for the defendant.

The several facts stated constitute but a single ground of defence; hence to state them is not duplicity. Gould pl. s. 112, ch. 6, part 2; *Robinson* v. *Rayley*, 1 Burrow, 316, 319, pr. Lord Mansfield, Ch. J.; *Hathaway* v. *Rice*, 19 Vt. 102.

The technical defence is that no assault was committed because nothing was done against the plaintiff's will. *Christopherson* v. *Bare*, 63 E. C. L. 472, 477; 17 L. Q. B. 109; *Smith* v. *State*, 12 Ohio St. 466; *Dickey* v. *McDonnell*, 41 Ill. 62; *Duncan* v. *Commonwealth*, 6 Dana 295; *Hegarty* v. *Shene*, 14 Cox. Cr. Cas. 148.

If the plaintiff has induced the assault by his own misconduct he cannot recover. *Hawe* v. *Planner*, 1 Saund 13, 14; *Aldrich* v. *Harvey*, 50 Vt. 162; *Spaulding* v. *Preston*, 21 Vt. 1; *Booth* v. *Hodgson*, 6 T. R. 409; *Dickey* v. *McDonnell*, *supra*; *Swan* v. *N. B. A. Co.*, 7 H. and N. 633, 634; *Watrous* v. *Steele*, 4 Vt. 629; *Nott and Wife* v. *Stoddard*, 38 Vt. 25, 31; *Sutton* v. *Smith*, 13 Mo. 120; *Emerson* v. *Balch*, 5 Dane's Abr. 566; *Commonwealth* v. *Power*, 7 Met. 596; *Ellis* v. *Cleveland*, 54 Vt. 437; *Cogdell* v. *Yett*, 1 Cold. 230; *McBride* v. *McGloughlin*, 5 Watts, 375, 376; *I. C. R. R.* v. *Allen*, 39 Ill. 205; *Phillips* v. *Wooster*, 36 N. Y. 412; *Cotterill* v. *Jones*, II C. B. 713; Com. Dig. Tit. Pleader, p. 801, citing 2 Rol. 393.

J. K. Darling and R. M. Harvey, for the plaintiff.

The defendant's pleas are evasive and argumentative. Chit. Pl. 539; Gould, Pl. 55, 56.

They are bad for duplicity. 1 Chit. Pl. 226, 532; Gould Pl. 390, 399; Stephen Pl. 247; *Downer* v. *Rowell*, 26 Vt. 397; *Luce* v. *Harrington*, 55 Vt. 341; *Andover* v. *Mt. Holly*, 58 Vt. 372.

Ezra Willey *v.* Nathan R. Carpenter.

Mere words are not a defence to an action for an assault. *Cushman* v. *Ryan*, 1 Story 100; *Avery* v. *Ray*, 1 Mass. 12; *Lee* v. *Woolsey*, 19 Johns. 319; *Rochester* v. *Anderson*, 1 Bibb. 428; *Mowry* v. *Smith*, 9 Allen 67; *Richardson* v. *Lentz*, 26 La. 313; *Ireland* v. *Elliott*, 5 Ia. 478; *Thrall* v. *Knapp*, 17 Ia. 468; *Morley and Wife* v. *Dunbar*, 24 Wis. 183; *Wilson* v. *Young*, 31 Wis. 574; *Fenelow and another* v. *Butts*, 53 Wis. 344; *Donnelly* v. *Harris et al.*, 41 Ill. 126; *Gizleo* v. *Witzel*, 82 Ill. 322; *Norris* v. *Casel*, 90 Ind. 143.

Nor will the consent of the plaintiff justify the act. *Adams* v. *Waggoner*, 33 Ind. 531; *Slout* v. *Wren*, I Hawks 420; *Commonwealth* v. *Colbery*, 119 Mass. 353; *Barholt* v. *Wright*, (Ohio) 10 W. Rep. 451.

The opinion of the court was delivered by

THOMPSON, J.—I. This is an action of trespass for an assault and battery. To the defendant's second plea, the plaintiff demurred specially. The first cause of demurrer assigned is that the plea is argumentative, and the second cause is that it "is double and bad for duplicity." It has been expressly held that each of these causes of demurrer can only be reached by special demurrer, and that the pleader to avail himself of them, "must point out specifically in his demurrer wherein the duplicity or argumentativeness exists." *Onion* v. *Clark*, 18 Vt. 363; *Buell* v. *Warner*, 33 Vt. 570; *Carpenter* v. *McClure*, 40 Vt. 108; 1 Chitty's Pl. (4th Am. Ed.) 667. Under these authorities, we think the first and second causes of demurrer are not sufficiently assigned.

However, we do not think this plea bad for duplicity. The facts set forth in the plea as occurring prior to the service of the writ in the action brought by defendant's wife against the plaintiff for slander, are stated simply as matters of inducement. Gould's Pl. (4th Ed.) ss. 9, 11, Ch. 3. All the plaintiff's alleged actions, speeches and conduct subsequent to that time, taken as

a whole, and not singly, constitute the ground on which the defendant puts his defence. Hence, it was good pleading to specially state them, however multifarious they might be. Gould's Pl. (4th Ed.) s. 112, Ch. 6, Pt. 11.

Another cause of demurrer assigned and relied upon, is that this plea does not aver that the plaintiff's course or conduct as alleged, was for the purpose of procuring the defendant to commit the wrong and injury to the plaintiff set forth in the declaration, and we think the plea bad in not having such an allegation.

II. The defendant's third plea is the same as his second plea, with the exception that it alleges that the actions, speeches and conduct of the plaintiff from and after the bringing of the action for slander, as therein alleged, were wilfully done, made and had by the plaintiff, for the purpose of provoking the defendant to strike the plaintiff and thereby obtain this cause of action against him. To this plea the defendant demurred generally.

With reference to this plea, the only point made by the plaintiff in argument, is that the facts therein stated are not such as to justify the alleged assault and battery. This contention is sound.

The alleged speeches and conduct of the plaintiff, although for the purpose of provoking the defendant to strike him, are no defence. Mere words, however gross, and abusive, cannot justify an assault and battery. This is the rule adopted after careful consideration, in *Goldsmith's Admr.* v. *Joy*, 61 Vt. 488. This case is so recent, and this question is there so fully discussed, and the authorities cited and examined to such an extent, that we do not deem it necessary to enter upon a further discussion of the question.

Such provocation is only admissible on the question of exemplary damages. That class of cases which holds such provocation admissible in mitigation of actual damages, does not go to the extent of

holding it to be a full defence. *Keiser* v. *Smith*, 71 Ala. 481 (46, Am. Rep. 342); also see cases cited in *Goldsmith's, Admr.* v. *Joy*, *supra*. The acts of the plaintiff in "malignantly" leering at the defendant and in making taunting grimaces at him, were provocations of the same character as insulting and provoking language. None of these acts were of such a character as to amount to an assault by the plaintiff upon the defendant, and in order to justify him in striking in self-defence, the act complained of must constitute an assault.

If the facts set forth in the third plea are taken to amount to a license by the plaintiff to the defendant to commit the alleged assault and battery, such license is no defence to this action. 2 Greenl. Ev. (10th Ed.) Sec. 85; 1 Hill. on Torts, (3 ed.) 183; 1 Bac. Abr. (Bouv. Ed.) Assault & Battery, 372. The assaulting or beating of one person by another is a breach of the peace and a misdemeanor at common law as well as by R. L. s. 4228. In *Stout* v. *Wren*, 1 Hawks 420 (9 Am. Dec. 653) the plaintiff and defendant quarrelled and agreed to fight and after they had gone out for that purpose the defendant asked the plaintiff if he would clear him of the law, and the latter said yes, whereupon the defendant beat him, he making no resistance. The court say: "It is equally reasonable and correct, that a man shall not recover a recompense for an injury received by his own consent; but the rule must necessarily be received with this qualification, that the act from whence the injury proceeded be lawful. Hence, in those manly sports and exercises which are thought to qualify men for the use of arms, and to give them strength and activity, if two played by consent at cudgels and one hurt the other, no action would lie. But where in an action for assault and battery, the defendant offered to give in evidence that the plaintiff and he boxed by consent, from whence the injury proceeded, it was held to be no bar to the action, for as the act of boxing is unlawful, the consent of the parties to fight could not excuse the injury; *Boulter* v. *Clark*, Bull. N. P. 16."

In *Adams* v. *Waggoner*, 33 Ind. 531 (5 Am. Rep. 230) the court after citing the foregoing authorities and others say: "We think the deduction and conclusion to which we have come, are fully warranted by the law and the reason thereof; which is, that an agreement, leave or license, to do an act which in itself is unlawful, forbidden by positive law, and for the doing of which a penalty is attached and announced, whether a felony or a misdemeanor is no defence to an action for damages by a party who has been injured by the doing of such act, though he made the agreement, gave the license, leave and consent; but when the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauching a man's wife or daughter, slander, libel, or trespass on his real estate or to his personal property, agreement, consent, or license, is a good defence." This doctrine is approved in *Commonwealth* v. *Collberg*, 119 Mass. 350; *McCue* v. *Klein*, 60 Tex. 168; (48 Am. Rep. 261); *Shay* v. *Thompson*, 59 Wis. 540 (48 Am. Rep. 538); *Barholt* v. *Wright*, 45 Ohio St. 177 (4 Am. St. Rep. 535 & Note). These authorities all go upon the principle that the act assented to being unlawful at common law, the consent of the plaintiff is no bar to his action. An exception to this rule, is that class of cases like rape or an assault with intent to commit rape, where the female has arrived at the age of consent, in which the absence of consent is essential to constitute the offense. In *Barholt* v. *Wright*, *supra*, in discussing this exception, the Court says: "In all such cases the consent of the female would, without doubt, be a bar to any right she would otherwise have to maintain an action for an assault and battery. It is said by Judge Cooley in his work on torts, page 163, that 'consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. * * * A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These

cases are plain enough, because they are cases in which questions arise between the parties alone.' 'But,' he adds, 'in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order.' See also, to like effect, Pollock on torts, 139." We think the rule that consent will not justify an assault and battery is good law and conducive to a sound public policy. "The law abhors the use of force either for attack or defence, and never permits its use unnecessarily." *Howland* v. *Day*, 56 Vt. 318. If the consent of a person to a moderate assault and battery upon him were a justification, we see no reason why consent to one so great as to take his life would not also be a justification. A man cannot consent to the taking of his own life. "His life is not his to take or to give away; it would be criminal in him to take it and equally criminal in any one else who should deprive him of it by his consent." *McCue* v. *Klein, supra.* 1 Bish. Cr. Law (4th Ed.) ss. 954, 955.

Judgment affirmed and case remanded with leave to replead on the usual terms.

ARTHUR L. PIERCE *v.* W. L. BRADFORD.

Husband and wife. Wife as witness to transaction by her as agent.

The question being whether the defendant has paid the plaintiff $25, the defendant testified that he gave his wife that sum for that purpose, and left the house; coming in soon after he saw the plaintiff standing beside the table counting some money and heard him say, "it is all right." *Held*, that the defendant's wife was a competent witness to testify that she put the money upon the plaintiff's plate at the table, from whence he took it saying, "all right."

Assumpsit. Heard upon the report of a referee and exceptions thereto at the March term, 1891, Washington county, Munson, J., presiding. Exceptions overruled and judgment for the plaintiff in the sum found by the referee. The defendant excepts.

The case appears in the opinion.

Bates & May, for the defendant.

The wife was a competent witness. R. L. s. 1005; No. 45 Acts 1886; *Easterbrooks* v. *Prentiss*, 34 Vt. 459; *Orcott* v. *Cook*, 37 Vt. 517; *Lunay* v. *Vantyne*, 40 Vt. 501.

J. P. Lamson, for the plaintiff.

The wife was not competent. This was not a matter of business transacted by her as the agent of her husband. *Carpenter* v. *Moore*, 43 Vt. 392; *Sargeant v. Seward*, 31 Vt. 509; *Cram* v. *Cram*, 33 Vt. 15; *Davis* v. *Davis*, 48 Vt. 502: *Orcutt* v. *Cook*, 37 Vt. 515; *Town* v. *Lamphire*, 37 Vt. 52; *Eastabrooks* v. *Prentiss*, 34 Vt. 457; *Bates* v. *Cilley*, 47 Vt. 1.

The opinion of the court was delivered by

THOMPSON, J. The principal contention between the parties was whether the defendant had paid the plaintiff $25, to

apply on his claim for work performed for the defendant. At some time near the date of the alleged payment, the plaintiff told defendant's wife that he wanted some money, which she communicated to the defendant. The defendant's evidence tended to show that on the morning of Sept. 16, 1889, when he got up, he gave his wife $25, and directed her to give it to the plaintiff, and then went to the barn to do his chores; and that the plaintiff soon after got up and came to the barn to work; that the plaintiff went into the house first, but was soon followed by the defendant, and that just as he stepped into the house he saw the plaintiff standing at the table with some money in his hand which he was then counting and which he put into his pocket, saying as he did so, "it is all right."

The defendant then called his wife as a witness and offered to prove by her that she took the $25, which he had given her, and as she was setting the breakfast table put the money on the plaintiff's plate, and that when he afterwards came in, he took the money from the plate and said "all right." To this testimony the plaintiff objected and his objection was sustained by the referee and the evidence excluded. As we construe the report, the referee excluded the testimony of the wife on the ground that the testimony of the husband, if true, did not tend to show such a state of facts as would constitute her his agent and thus make her testimony admissible under R. L. s. 1005 and St. 1886, No. 45 s. 2. The exclusion of the testimony offered was error. The payment of the $25, if made by the wife as the evidence tended to show, was clearly a business transaction conducted by her as the agent of her husband, which would make her a competent witness in his behalf under the statutes cited and the decisions of this Court. *Orcutt* v. *Cook*, 37 Vt. 517; *Lunay* v. *Vantyne*, 40 Vt. 501; *Martin* v. *Hurlburt*, 60 Vt. 364.

Judgment reversed and cause remanded for a new trial.

LAURA A. WALCOTT *v.* METROPOLITAN LIFE INS. CO.

Life Insurance. Presumption against suicide. Practice. When verdict should be directed.

1. In case of death from unexplained cause the presumption is against suicide.
2. When a life insurance company seeks to avoid payment of its policy upon the ground that the death of the insured was caused by his own act, the evidence must affirmatively show that fact.
3. If the defendant, without introducing any evidence upon its own part, moves for a verdict at the close of the plaintiff's evidence, it thereby admits the truth of such evidence, and the case should be disposed of accordingly.
4. The evidence of the plaintiff having shown the death of the insured and the making of the requisite proof, *Held*, that the court should have directed a verdict in her favor for the full amount of the policy.

Assumpsit upon a policy of life insurance. Plea, the general issue, with notice of special matter. Trial by jury at the September term, 1890, Washington county, Munson, J., presiding. The court directed a verdict for the plaintiff. Both parties except.

The plaintiff herself testified to the death of the deceased, but knew nothing as to its cause or manner. In the course of her examination it appeared that following his death, which was in Missouri, an inquest was held before a coroner and jury, and that a certified copy of the findings of the jury had been sent the defendant. Counsel for the plaintiff, while doubting the admissibility of the document, stated his willingness that it should go to the jury. Counsel for the defendant pointed out certain inconsistencies in the same, having reference to the law of Missouri, but did not state whether he desired to have it admitted or not.

At the close of the plaintiff's own testimony, one Boyce was introduced as a witness, who testified that he acted as the administrator of the deceased and the attorney for the plaintiff and as such visited the office of the defendant, and that he was informed there that the deceased had paid certain premiums, for which he held receipts, upon the policies. After this the plaintiff introduced the policy itself and rested.

The defendant thereupon objected that there was nothing in the case to show that any proof of death had ever been made. Upon this objection, the court permitted the plaintiff to withdraw her rest, and to inquire further of the witness Boyce, who testified that he sent proofs of death and had received an acknowledgement of their receipt from the defendant. He was now cross-examined as follows:

"Q. Have you received any other communication whether the proof was satisfactory except this check, and the letter accompanying it? A. No, sir.

Q. Why did the company refuse to pay this policy?

A. I never had any explanation further than these letters.

Q. Did they tell you they refused to pay it because the man committed suicide?

A. No, sir. They said they should investigate the proof and let me know later.

Q. You sent on the proofs of death to them? A. Yes sir.

Q. What was the cause of death alleged therein? Objected to.

Mr. Shurtleff—Produce your letters and papers; those are the best evidence; I don't object if he is allowed to state the whole of it, what the papers contained.

The Court—You may ask the question with that understanding.

Q. Is that one of the documents you sent to the company —handing a paper to the witness.

A. No, sir. I should say not; it may be a copy of it or seme parts of what I sent, and I am not sure but what this may be one of them (examining paper) on examination of the paper I should say this was one of the papers I sent them.

Q. What other papers did you send them?

A. I do not recollect whether any or not; I could not without thinking it up, and looking at the correspondence.

(Marked defendant's exhibit A.)

Q. Where did you procure this paper?

A. It was handed to me by Laura A. Gamble, plaintiff in this suit.

Q. And transmitted by you to the company as one of the proofs of death?

A. It was.

Q. You have read this?

A. I have looked it over when it was handed to me.

Q. It purports to be a copy of the findings of the coroner's jury does it not?

A. Something of that purport.

Q. Wherein they report that the cause of this man's death was insanity?

A. Yes, sir; precisely.

Q. Didn't you have correspondence with the company so that you knew what the company claimed in respect to this policy?

A. I do not recall that there was any correspondence or conversation when I saw them about that matter at the home office; it was one of the adjusters of the claims on the one thousand dollar policies; they were divided into departments, and this man's office was near the top of the building, but we had very little conversation at the time and it was mentioned by him to me that there was such a clause in their policy, that there was such a clause in regard to suicide.

Q. That the company would not be liable if the insured suicided?

A. They called my attention to the clause and said they should want to have the proofs, and in some letter I think they wrote me what they would want, or what they would like and I forwarded such proof as I understood they wanted, and there was never a word said when they sent me the check.

Q. They refused to pay the policy because the insured committed suicide?

A. They did not refuse to pay in any way, and I do not recall the letter, but I understood that if she accepted that, that she was to receipt in full for everything.

Q. Didn't you have communication with the company by writing? didn't you write them considerable on the subject?

A. I do not recall writing more than three or four times.

Q. Do you remember writing a letter in September, 1888, in which you sent them a finding of this Coroner's inquest out there with the names of the jury?

A. I might have; I don't remember now; in some other letter at some time, I sent what was furnished me as a copy of the Coroner's proceeding and the jury.

Q. Advising the company that this man committed suicide?

A. I might have used that.

Q. Didn't you send them a copy of the coroner's findings?

A. Yes, sir. Certainly; I sent them some paper, and I think that was it.

Q. When were you in New York?

A. I think I was there in October; and I think I have been there two or three times; twice, one time was in October I think.

Q. Hadn't you before that notified the company that you held this claim—that W. A. & O. B. Boyce held it, and they must pay it?

A. I think the first communication I wrote them was to the effect of that, before I was through there.

Q. Don't you remember that you had communicated to them the fact that this man had died, and that you made a claim, before you went to New York?

A. I should rather think I did, and rather think I mentioned the substance of the coroner's verdict.

Q. When you were in New York at the company's office, didn't you have conversation with the officers about paying the claim, to ascertain the grounds they refused upon?

A. I have not seen any of the principal officers since the proofs were admitted in regard to the matter, the adjuster said he would not take the responsibility, but the question was raised and he talked it over.

Q. That question of suicide?

A. I had written to him about it and he said he would not take any responsibility to say whether they would or would not, until he conferred more fully with the other officers of the company; and that was distinctly understood between us two, the substance of the coroner's investigation, that was talked but he did not commit himself, he was reticent about saying anything the first time I saw him to see whether the matter was paid, and how it stood on the books.

Mr. Porter—This document which he testifies was a part of the proof of death, I suppose is in evidence?

The Court—It is not in necessarily, unless you offer it; do you offer it?

Mr. Porter—No, I do not offer it.

Mr. Shurtleff—Is there anything further from Mr. Boyce?

Mr. Porter—No.

Mr. Shurtleff—We now rest then. We are willing that that document shall go in evidence; we do not want to put it in subject to any objection. I thought by the way Mr. Porter referred to it the last time that it might go in by mutual agreement.

Mr. Porter—I think there is enough in evidence to raise the question we make in this case, that is the right of the plaintiff to recover under this contract. The company sets forth, and it is stated in the contract that the company will not be liable in the case of suicide of the insured in the event of his dying by his own hand, whether sane or insane. Under the terms of this policy we say the plaintiff cannot recover. There is no proof in the case so far as I can see that there was any case of insanity, but whether sane or insane at the time the act was committed, we say they cannot recover under the provisions of the policy in that behalf, and we ask the direction of a verdict to that end.

Mr. Shurtleff—We have a right to go to the jury as to the condition this man's mind was in, we claim the right to go to the jury on the question whether it is not such a case as we have the right to recover upon."

The policy provided that in case of death by suicide the company should be liable only for the amount of the premiums paid without interest.

At the conclusion of the plaintiff's case the defendant moved for a verdict, which motion was overruled. Thereupon the plaintiff moved for a verdict for the amount of the policy. This motion the court also overruled, and gave judgment for the plaintiff in the amount of the premiums paid.

Boyce & Shurtleff, for the plaintiff.

Arnoux, Ritch & Woodford, and *Dillingham & Huse*, for the defendant.

It was practically a conceded fact in the case that the deceased died by his own hand. That being so, the plaintiff can-

not recover under the conditions of the policy. *Bigelow* v. *Berkshire Life Ins. Co.*, 93 U. S. 284; *DeGogorza* v. *Knickerbocker Life Ins. Co.*, 65 N. Y. 232; *Northeastern Ins. Co.* v. *Haslett*, 105 Ind. 218; *Pierce* v. *Travelers' Ins. Co.*, 3 Ins. Law Jr. 422; *Van Zandt* v. *Mutual Benefit Co.*, 55 N. Y. 169; *Schmidt* v. *Home Life Co.*, 8 Ins. Law Jr. 77 (Ohio); *Atakins* v. *Columbia Life Ins. Co.*, 70 Mo. 27; *Scarth* v. *Security Soc.*, 75 Iowa, 346; *Streeter* v. *Western Soc.*, 8 W. Rep. 183 (Mich.); *Clift* v. *Schwabe*, 3 C. B. 437.

The opinion of the court was delivered by

THOMPSON, J. The plaintiff seeks to recover the amount of a policy of insurance on the life of Andrew J. Gamble, under which she as his widow is the beneficiary.

Among other conditions in the policy is the following: "The liability of said company shall not be deemed to cover the risk of death by suicide; but in the event of the life insured dying by his own hand or act, whether sane or insane, said company shall be held only, upon the surrender of this policy, accompanied with proofs of death, as herewithin provided, to return to the said assured the sum of the net premiums previously received, without interest."

The policy of insurance declared on was put in evidence by the plaintiff. She also introduced evidence of the death of the insured, the payment of the premiums that had become due on the policy according to its terms, at the time of his death, and of the furnishing the defendant with satisfactory proof of his death.

The plaintiff testified in substance that the insured died sometime during the night of Aug. 10, 1888, and that she learned of his death about six o'clock the following morning; that about three weeks before his death they had a little girl about a year old die to whom he was very much attached, and that her death so affected him that he became low spirited, melancholy, and

unable to sleep or rest nights, to such an extent that it affected his health and caused him to keep his room; that on the night of Aug. 10, 1888, he retired to his bed with his wife, the witness, as usual, and got up at half past eleven in the evening and went out, stating as he went out the purpose for which he was going, "and that he would be right back again;" that the witness being tired, fell asleep and did not awake until morning, and that she never saw him again alive. The reporter's certified transcript of the case shows that the counsel for the plaintiff admitted on trial that a coroner's inquest was had respecting the death of the insured, and that certain findings were made in respect thereto by the coroner's jury. It also appeared that a certified copy of the findings of the coroner's jury was furnished the defendant by the plaintiff with the proof of the death of the insured, and that the defendant's attorney had this copy in court during the trial of the case below; that the plaintiff offered to put the same in evidence, if the defendant would permit her to do so without objection, or to permit the defendant to put the same in evidence without objection, but the defendant declined to put the same in evidence itself, or to permit the plaintiff to do so. W. A. Boyce, one of the plaintiff's attorneys, testified in her behalf, and on cross examination was shown the copy of the findings of the coroner's jury and admitted that it was one of the papers which he sent with the proof of death to the defendant, whereupon he was interrogated by the defendant as follows:

"Q. It purports to be a copy of the findings of the coroner's jury, does it not?

A. Something of that purport.

Q. Wherein they reported that the cause of this man's death was insanity?

A. Yes sir; precisely."

There was no other evidence excepting as above stated tending to show the circumstances attending the death of the insured or the cause of his death. The defendant introduced no evidence but at the close of plaintiff's case rested and moved the

Court to direct a verdict in its behalf on the ground that the plaintiff's case showed that the insured committed suicide, or died by his own hand, sane or insane, and that the Company was not liable by virtue of the exception quoted.

It is not necessary for us to decide as to the admissibility of the finding of the coroner's jury, either alone or as a part of the proof of death, as that question is not raised by either side. As the case stood when this motion was made and when the case was disposed of by the Court below, there was no evidence tending to show that the insured committed suicide or died by his own hand, sane or insane. It is to be assumed that the witness Boyce correctly stated the finding of the coroner's jury as to the cause of the death of the insured, otherwise the defendent would have put in evidence the proof of death furnished, and which included a copy of this finding. If it were true "that the cause of the man's death was insanity," that fact had no tendency to prove that he committed suicide, or died by his own hand, sane or insane. Insanity, as well as fever or any other disease, may cause a natural death. Nothing appearing to the contrary, whether a man die from the effects of insanity or any other disease, the legal presumption is that he died a natural death from natural causes, and not from an act of self-destruction. A person is found dead; the presumption is that his death was natural or accidental. The mere fact of death in an unknown manner creates no legal presumption of suicide or the taking of one's life by his own hand or act. Upon evenly balanced testimony, the law assumes innocence rather than crime. Laws. Presump. Ev. 192; May on Ins. (2d Ed.) s. 325; *Mallory* v. *Travelers' Ins. Co.* 47 N. Y. 52, (7 Am. Rep. 410); *Cronkhite* v. *Travelers' Ins. Co.* 75 Wis. 116, (17 Am. St. Rep. 184); *Freeman* v. *Travelers' Ins. Co.* 144 Mass. 572, (4 N. E. R. 621).

Travelers' Ins. Co. v. *McConkey*, 127 U. S. 661, (L. Ed. Book 32, 308), was an action upon an accident policy of insurance. The defence was: (1) That the death of the insured was caused

by suicide; (2) That it was caused by intentional injuries inflicted either by the insured or by some other person. The Court below instructed the jury that, "it is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence that suicide cannot be presumed. The plaintiff is therefore entitled to recover unless the defendant has by competent evidence overcome this presumption and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part. The presumption is that the death was not voluntary; and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption and satisfy the jury that the death was voluntary." The U. S. Supreme Court by Harlan, J., on this question, say: "In respect to the issue as to suicide, the Court instructed the jury that self-destruction was not to be presumed. In *Mallory* v. *Travelers' Ins. Co.* 47 N.Y. 52—which was a suit upon an accident policy,—it appeared that the death was caused by accidental injury or by the suicidal act of the deceased. 'But,' the court properly said, 'the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts." The case being barren of any evidence tending to show that the insured took his own life, and the presumption of law being to the contrary on the facts shown, the court below properly denied the defendant's motion to have a verdict directed for it.

There being no evidence tending to show self-destruction by the insured, there is no occasion to pass upon the legal effect of this condition in the policy as affecting the right of recovery in a case where the insured, being sane or insane, destroys his own life.

2. The plaintiff also moved the court to direct a verdict for her for the full amount of the policy, which motion the court denied and directed a verdict for her for the amount of the net premiums received by the defendant without interest. In this there was error. The defendant by its motion for a verdict on the evidence introduced by the plaintiff, admitted not only the testimony to be true, but also every conclusion which a jury might fairly or reasonably infer therefrom. *Parks* v. *Ross*, 11 Howard (U. S.) 372, (L. Ed. Book 13, 730). After its motion was overruled, the defendant did not then ask to go to the jury on any question raised by the evidence, but elected to stand upon its motion for a verdict and its exception to the ruling of the court denying it. As the case then stood, the undisputed evidence clearly established the right of the plaintiff to recover the full amount of the policy, and a verdict to that effect should have been directed for her. There was no conflict of evidence, and it, with the inference of law arising therefrom, directly proved the facts in issue. *Lindsay* v. *Lindsay*, 11 Vt. 621; *Wilder* v. *Wheeldon*, 56 Vt. 344; *Noyes* v. *Rockwood*, 56 Vt. 647; *St. Johnsbury* v. *Thompson*, 59 Vt. 300; *Latremouille* v. *Bennington & Rutland Ry. Co.*, 63 Vt. 336.

Judgment reversed and cause remanded for new trial.

TAFT, J., dissenting.

This action was brought to recover upon a policy of life insurance. The death of the assured was conceded, and therefore the plaintiff was entitled to recover. If the assured died by his own hand or act, sane or insane, the plaintiff was entitled to recover the net premiums paid on the policy. If he did not die by suicide, she was entitled to recover the amount insured. The

opinion of a majority of the court states: "There was no evidence tending to show that the insured committed suicide, or died by his own hand, sane or insane." If this was true, a verdict should have been ordered for the amount insured; but, was it? In putting in the evidence the defendant claimed: "The fact is, this man committed suicide." This shows the defendant's claim, and Mr. Boyce, the plaintiff's agent or attorney, testified that he sent the defendant the findings of the coroner's jury in connection with, and as a part of, the proofs of loss, and responded to this inquiry— "Q. Advising the company that this man committed suicide?"—by answering: "I (it, the proofs) might have used that term." I think this testimony of Mr. Boyce had a tendency to show death by suicide, and in that view of the case, that question should have been submitted to the jury to determine which sum should be recovered; the amount of the net premiums, or the amount insured; and the disposition of the case by the majority of the court is correct; but I think the fair construction of the exceptions is, that not only was there testimony tending to show death by suicide, but that that fact was conceded upon trial. A large part of the testimony given upon the trial, was upon the question of the insanity of the insured at the time of his death. Mr. Shurtleff says: "We will examine the witness further with reference to the condition this man was in, immediately prior to his death." Whether the testimony to show insanity should come from experts was a question made by the defendant's counsel, and passed upon by the court. The testimony strongly tended to show insanity, and when it was all in, the position of the plaintiff is shown by the claim made by Mr. Shurtleff, and it was the only question which he wished to have submitted to the jury. "We have a right to go to the jury as to the condition this man's mind was in. We claim the right to go to the jury on the question, whether it is not such a case as we have a right to recover upon." In other words, it was in

effect saying, this man committed suicide, and we have a right to recover, because at the time he suicided, he was insane.

The counsel say in their brief, that the fact of suicide was not admitted, and comment. "How the court could assume upon this evidence to direct a verdict, is beyond comprehension." The whole testimony aside from the relationship of the parties, and the fact of death, was upon the question of insanity. What the counsel were introducing testimony upon the question of insanity for, unless the fact of suicide or testimony tending to show it, was in the case, is as incomprehensible to me as ordering a verdict seems to have been to them, for under no conceivable circumstances was it pertinent unless the man died by his own hand. Unless the fact of suicide was in, the only charitable explanation to be given the conduct of every one connected with the trial is, that the evidence upon, and the discussion connected with the question of insanity of the assured, had so upset the minds of both court and counsel, that for the time being they were afflicted with the same disease. Giving the exceptions the construction that I do, is the only way you can consistently account for the conduct of the counsel, or the action of the court.

I would affirm the judgment.

CATHERINE FOSTER'S *Exrs. v.* DELIA S. DICKERSON, *et al.*

Will. Legatee a competent witness. Mental capacity. Expert evidence. Objection to form of question. Leading question. Undue influence. Hypothetical question. Error not prejudicial. Instructions to jury. Subsequent declarations of testator. Request to charge.

1. A legatee is a competent witness to the capacity of the testator.
2. For the purpose of proving want of mental capacity the contestants introduced evidence tending to show that the testatrix had many insane delusions, and that among other things she continually accused her husband of improper conduct with other women. *Held*, that the proponents might show in rebuttal what the conduct and reputation of the husband in this respect was, so far as it was known to the testatrix.
3. A witness, not an expert, may give an opinion as to the insanity of a person, based upon conversations or dealings had with that person; and that such conversations or dealings have been limited in extent, goes not to the admissibility, but to the weight of the evidence.
4. An objection, which refers merely to the form of a question, must be defined when made, or it will not be afterwards available.
5. Where an objection is pointed out in the trial court, the excepting party is confined to that ground of exception in Supreme Court.
6. A non-expert witness, testifying from facts within his own observation, may give an opinion as to the sanity of the person whose capacity is on trial, notwithstanding that is the very question for the jury, and an expert witness may do the same, although he bases that opinion upon facts testified to by others.
7. A witness, who had had great experience in nursing and caring for the insane, having testified that she had seen and conversed with the intestate for an hour at a time on two or three different occasions, and that there was nothing in her manner to indicate impairment of mind, may be further asked the qustion, "Do you think you could have seen

and conversed with Mrs. Foster an hour and a half as you conversed with her, and not have discovered any insanity if any existed in her?" as against the objection of the contestants that it was leading and that the proper foundation had not been laid for it.

8. Where witnesses testify that they, from their conversations with the intestate regarded her as insane, they may be asked upon cross-examination what the statements upon which they base their opinions were.

9. A witness for the proponent having testified that the intestate gave a deposition before him and that she appeared sane, it is not competent for the contestants to prove that other persons, the while inmates of an insane asylum, have given intelligent depositions and been permitted to testify in court.

10. A former attorney testified that from his transactions with the testatrix he considered her insane and that one of these transactions was the drawing of a petition to the Probate Court which was at the time read to her. *Held*, that the petition was admissible.

11. For the purpose of showing the feelings of the testatrix towards her relatives, and as bearing, therefore, upon the question of undue influence, letters written by the testatrix, and those written by her relatives, the contents of which must have been known to her are admissible.

12. The writer of such a letter may explain the circumstances under which it was written, and the meaning which she intended to convey.

13. A judgment will not be reversed for error in the admission of testimony, unless the exceptions affirmatively show that the testimony "in the then present aspect of the case" was inadmissible.

14. The proponents are not confined to the same hypothetical questions which the contestants have propounded to their expert witnesses.

15. The contestants propounded a certain hypothetical question to their expert witness. The proponents introduced an expert, who also had an intimate personal acquaintance with the testatrix. After having testified fully as to his knowledge of her, he was asked to give an opinion of her sanity, assuming that the facts stated in the hypothetical question of the contestants were true and combining those with his own knowledge of the testatrix. *Held*, that by his "own knowledge" must be intended the facts which he had already recited, and that so understood the question was admissible.

16. An expert may be asked to base an opinion upon the testimony of a

witness to which he has listened, assuming that testimony to be true.

17. The excepting party cannot claim that as error which he insisted should be done in the court below.

18. Judgment will not be reversed for an error beneficial to the excepting party.

19. The parties having stipulated that the stenographic minutes of testimony taken on the trial of this cause before the Probate Court might be used in the County Court, if a witness was "unable to attend court by reason of sickness," the fact that a witness had been in attendance on County Court and had there testified, does not prevent the use of his testimony taken in the Probate Court, if the witness is unable to attend court when that testimony first becomes pertinent.

20. The action of the County Court in construing a stipulation between counsel will not be revised by the Supreme Court, if the stipulation is susceptible of the construction put upon it by the court below.

21. *Held*, that the court did not in effect instruct the jury that the testimony of a subscribing witness as to the capacity of the testative was to be given any greater weight than that of other witnesses having the same means of knowledge.

22. *Held*, that the court correctly instructed the jury as to the bearing of the subsequent declarations of the testatrix, upon the issues of testamentary capacity and undue influence.

23. It is a sufficient compliance with a request to charge to read it to the jury and tell them that it embodies good law.

24. In order to set aside a will for undue influence it must appear that the influence was exerted upon the very act of making the will.

25. And the influence must proceed to that extent that the free agency and independence of the testator is overcome, and he is constrained to do what is really against his will.

26. The court was not bound to tell the jury how much evidence would sustain a verdict upon the ground of undue influence.

This was an appeal from an order of the Probate Court for the District of Franklin, admitting to probate an instrument purporting to be the last will and testament of Catherine A. Foster. The contestants plead: First, that the paper was not the last will and testament of the said Catherine A. Foster.

Second, that the testatrix did not have sufficient mental capacity to make a will. Third, that the instrument was procured by undue influence and fraud. Trial by jury at the April term, 1888, Franklin county, Veazey, J., presiding. Verdict for the proponents. The contestants except.

The letters referred to in the opinion were letters which passed between the legatees under the will, and the contestants at the time of the confinement of the testatrix in the insane asylum, and had reference to her confinement there and final cure and release.

The stipulation referred to in point XV of the opinion was as follows:

"Whereas at the trial of the above entitled cause before the Probate Court for the District of Franklin the testimony of witnesses produced before said Probate Court and taken to be used before said Probate Court, was written down in full by John H. Mimms for the use of said Probate Court and said copy is now in the hands of said Probate Court.

Now it is agreed in the above entitled cause that the testimony so taken and used before said Probate Court of witnesses that may be deceased, or unable to attend court by reason of sickness or accident, or absent from this State, at the time said cause is tried in said Franklin County Court, may be read from said copy in the hands of the Probate Court, to the same extent that such witnesses might testify by laws and rules governing the admission and rejection of evidence, if present in court at the time of trial and offered as witnesses in said cause. Provided however that the testimony of the following witnesses used before said Probate Court is excepted from this agreement, viz: The three attesting witnesses to the will in question.

Persons absent from the State at the time of trial, referred to in the foregoing agreement shall include persons residing out of the State and who are not in the State at the time of the trial.

It is further stipulated that the witness Mrs. French of Bennington at the option of the proponents shall be considered unable to attend by reason of sickness under this agreement."

The remaining facts sufficiently appear in the opinion.

Wilson & Hall, for the contestants.

Mrs. Hayes, being a legatee under the will, was disqualified as a witness. The will if sustained, transfers the property in question to her. It is, therefore, in essense a contract one party to which is dead; hence the living party cannot testify. R. L. ss. 1001, 1002, 1003; *Davis, Admr.* v. *Windsor Savings Bank*, 48 Vt. 532; *Crocker, Exr.* v. *Chase*, 57 Vt. 413; *Pember* v. *Congdon*, 55 Vt. 58; *Barnes* v. *Dow*, 59 Vt. 530; *Farmers Ins. Co.* v. *Wells*, 53 Vt. 14; 1 Greenl. Ev. s. 329; *Lane, Exr.* v. *Lane*, 95 N. Y. 494; Id. 516; *Wade* v. *Pulcifer*, 54 Vt. 45; *Rooney* v. *Minor*, 56 Vt. 527; *Moore* v. *Taylor*, 44 N. H. 370, 375; *Chandler* v. *Davis*, 47 N. H. 462, 464; *Welch* v. *Adams*, 1 N. E. Rep. 59; 56 Am. Rep. 521.

The letters were inadmissible, being simply the declarations of third parties. *Edson* v. *Pawlet*, 22 Vt. 289; *Baird and Wife* v. *Fletcher*, 50 Vt. 603; *State* v. *Tatro*, 50 Vt. 483; *Ross* v. *White*, 60 Vt.; 1 Greenl. Ev. ss. 123, 124; *Ellis* v. *Cleveland*, 55 Vt. 358; *Stevens* v. *Joyal*, 48 Vt. 291.

Goodridge, who was permitted to give an opinion as to the sanity of the testatrix, was not an expert witness, and had only seen her briefly upon two occasions. He did not disclose a sufficient acquaintance with her to make his testimony competent. *Hathaway* v. *Nat. Life Ins. Co.*, 48 Vt. 335; *Crane* v. *Crane*, 33 Vt. 15; *Clapp* v. *Fullerton*, 34 N. Y. 190; *Reed* v. *People*, 42 N. Y. 270.

It was improper to allow Mrs. Hayes to explain what she meant by her letter to Mr. Foster. This was the introduction of parol evidence to vary a written instrument. *Cook* v. *Shearman*, 103 Mass. 21; *Selby* v. *Friedlander*, 22 La. Ann. 381.

The question put Dr. Foote, in which he was asked to couple his own knowledge of the testatrix with the facts assumed in the hypothetical question to Dr. Draper, was inadmissible. It is never permissible to couple with a hypothetical question facts that the evidence in the case has no tendency to prove. *Wetherby*

v. *Wetherby*, 38 Vt. 455; *Fairchilds* v. *Bascomb*, 35 Vt. 398; *Thayer* v. *Davis*, 38 Vt 163; *Lester* v. *Pittsford*, 7 Vt. 158; *Hathaway* v. *Nat. Life Ins. Co.*, 48 Vt. 335; *Thornton* v. *Thornton*, 39 Vt. 122; *Louisville Rd. Co.* v. *Faldey*, 1 West R. 878; Best Ev. (Morgan Ed.) 874 and note; *Luning* v. *State*, 1 Chand. (Wis.) 178; *State* v. *Clark*, 12 Ired. 151; 1 Greenl. Ev. 492.

Nor is it permissible to include in hypothetical questions, the opinions or conclusions of other witnesses as was done in the question to Dr. Hamilton. *Wetherby* v. *Wetherby*, 38 Vt. 455; *Fairchilds* v. *Bascomb*, 35 Vt. 399; *Louisville Rd. Co.* v. *Faldey*, 1 West. R. (Ind.) 878.

The charge of the Court as to the weight which should be given the testimony of a subscribing witness was erroneous. The evidence of such a witness is entitled to no greater consideration than that of any other. *Thornton* v. *Thornton*, 39 Vt. 157.

The declarations of the testatrix made subsequent to the execution of the will, were admissible upon the questions of affection or prejudice. *Lewis* v. *Mason*, 109 Mass. 169; *Shailer* v. *Bumsted*, 99 Mass. 126-7; *Johnson* v. *Brown*, 51 Tex. 66; Canada's Appeal, 47 Conn. 450; *Heistu* v. *Heistu*, 116 Pa. 612; Abbott, Trial Ev. 122, s. 70.

The charge of the court as to the manner in which and when influence might be proved was erroneous. The fact of undue influence may be inferred from the will itself, from the relations of the parties, and from proof of influence and control in other matters without any direct evidence as to the circumstances under which the particular will was made. *Baylies* v. *Spaulding*, 1 N. E. R. 914; Saunder's Appeal, 54 Conn. 108.

Ballard & Burleson, *Farrington & Post*, and *J. Noble Hayes*, for the proponents.

The legatee, Mrs. Hayes, was a competent witness. In no

sense can a will be construed as a contract, to which the legatees upon the one part, and the testator upon the other are parties. *Garvin, Admr.* v. *Williams*, 50 Mo. 212; *Gamache* v. *Gamfs*, 52 Mo. 287; *Stevens* v. *Joyal*, 48 Vt. 295; *Wyman et al.* v. *Syms*, 10 Allen 153; *Shailer* v. *Bumsted*, 99 Mass. 112; *Dikes* v. *Malahi*, 6 Mo. 171; *Entwhistle* v. *Feighner*, 60 Mo. 214; *Miltenberg* v. *Miltenberg*, 78 Mo. 27; *Lamb* v. *Lamb*, 2 West Rep. 698; *Flood* v. *Pragoff*, 79 Ky. 608; Mower's Appeal, 48 Mich. 442; *Nash* v. *Reed*, 46 Me. 230; *Bird* v. *Jones*, 37 Ark. 195; *Bronzemam* v. *Browning*, 31 Ark. 364; *Puries* v. *Orth*, 88 N. Y. 477; *Cole* v. *Denri*, 3 Hun. 610.

The ruling of the court that the witness Goodridge had sufficient acquaintance with Mrs. Foster to express an opinion as to her sanity or insanity, cannot be revised in this court. *Randolph* v. *Woodstock*, 35 Vt. 291-94-96.

The question put Alice Mack was a proper one. She was offered as an expert, and it was solely within the discretion of the County Court, to say whether she had qualified as such. If the question was leading, the court might allow it to be asked in its discretion. *Cavendish* v. *Troy*, 41 Vt. 99, 108; *State* v *Phin*, 48 Vt. 366-77.

Mrs. Hayes was properly allowed to explain what she meant by her letter. This did not vary the terms of the written instrument, but simply showed what meaning was to be put upon those terms. *Bracket et al.* v. *Wait & Moulton*, 6 Vt. 411, 425; *Noyes* v. *Canfield*, 27 Vt. 79; 1 Greenl. Ev. ss. 288, 288a.

It was permissible to show that the conduct and reputation of the husband of the testatrix as to his relations with other women, were such as the testatrix accused him of. This testimony showed that these accusations were not insane hallucinations, but based upon facts. *Bank of Middlebury* v. *Rutland*, 33 Vt. 414, 430; *Richardson* v. *Hitchink*, 28 Vt. 757; *Hard* v. *Brown*, 18 Vt. 87; *Lee* v. *Kilburn*, 3 Gray 594; *Bartlett* v. *Decreet*, 4 Gray 113; *Carpenter* v. *Leonard*, 3 Allen 32; *Whitcher* v. *Shattuck*, 3 Allen 319.

There was no error in the hypothetical question put by the proponents. The proponents were not confined to the same hypothetical question which had been asked by the contestants. They might require from their expert witnesses an opinion upon the assumption that the facts testified to by one or more witnesses were true so long as those facts were not conflicting. *Gates* v. *Fletcher*, 67 Wis. 504-7; *Wetherbee, Exr.* v. *Wetherbee*, 38 Vt. 454; *Johnson* v. *Central Vt. Rd. Co.*, 56 Vt. 708; *Meeker* v. *Meeker*, 74 Iowa, 352-4-7.

The charge upon the question of undue influence and the manner in which that could be proved, was correct. *Trumbull et al.* v. *Gibbons*, 2 Gab. (N. Y.) 117, 136; *Taylor* v. *Kelley*, 31 Ala. 59, 70; *Hall* v. *Hall*, 58 Ala. 131-4.

The letters introduced in evidence, accompanied by proof that the testatrix knew their contents, were competent as bearing upon the question of undue influence, in that they showed the relations between the testatrix and the legatees and contestants, and what the feelings of the testatrix probably would be. Greenl. Ev. s. 101; *Wheeler* v. *Anderson*, 3 Hagg. C. Cl. 574, 608; *Wright* v. *Tatham*, 1 Ad. & El. 3; 7 Ad. & El. 313; s. C. 4 Bing., N. C. 489; *Waterman* v. *Whitney*, 11 N. Y. 164; Shouler Wills, s. 193; *Sutton* v. *Sutton*, 5 Harr. 459; *Couch* v. *Couch*, 7 Ala. 519.

The subscribing witnesses to a will are competent to express an opinion as to the mental capacity of the testator without proof of any special acquaintance with him. The mere fact that they act in that capacity, qualifies them to express an opinion for whatever under the circumstances it may be worth. *Williams* v. *Lee*, 47 Md. 159; *Van Huss* v. *Rambult*, 42 Tenn. 139; *Needham* v. *Ide*, 5 Peck, 510; *Gibson* v. *Gibson*, 9 Yerger, 329; *Brooke* v. *Townsend*, 7 Gill. 10; Red. Am. Cas. Wills, 89; *Thornton* v. *Thornton*, 39 Vt. 122.

It was proper for Dr. Foote to testify as to his action in reference to the release of the testatrix from the insane asylum, and

that he interested himself in that matter by the request of Mrs. Hayes, this fact being known to the testatrix. *Bateman* v. *Bailey*, 5 T. R. 512; Greenl. Ev. 108; *Hill* v. *Morth*, 34 Vt. 604.

The opinion of the court was delivered by

THOMPSON, J. This is an appeal from a judgment admitting to probate an instrument purporting to be the last will and testament of Catherine A. Foster.

The contestants are the heirs at law of the testatrix, and oppose the allowance of such instrument on the ground of want of mental capacity in the testatrix to make a will, and that the instrument was procured by undue influence and fraud.

1. Mrs. Julia Hayes, one of the legatees under the will, subject to the contestants' exception, was admitted as a witness on behalf of the proponents and was allowed to testify upon all the material issues in the case. The evidence of the contestants tended to show that this witness was one of the parties who exercised an undue influence over the testatrix, if any was exercised, in the production of the instrument admitted to probate, and they insist that she is a party to this issue raised by the pleadings and on trial, especially as she is a beneficiary under this instrument, and that the deceased testatrix is the other party thereto, and that consequently Mrs. Hayes is not a competent witness by reason of the provisions of R. L. ss. 1002, 1003. This is not a case "where one of the original parties to the contract or cause of action in issue and on trial is dead." There was no cause of action until the death of the testatrix. The testatrix by her legal representatives is not a party to these proceedings or in any way interested therein, directly or indirectly. The controversy is between living parties, who, on the one side, are the legatees under the will, represented by the proponents, and on the other side, are the heirs at law of the testatrix. The former claim to take the estate under the will, and the latter under the statute regulating the descent of estates, insisting that

the alleged will is a nullity. The act of the testatrix in making the alleged will is only the subject matter of the investigation. The proceedings to have the will admitted to probate are in the nature of proceedings *in rem* and establish the relation of all parties to the *corpus* of the estate. The gist of the action is not changed by the fact that the trial may indirectly involve a determination of the relations of the witness to the testatrix. "The probate of a will establishes its *status*; and the *status* thus established adheres to the will 'as a fixture, and the judgment or decree in the premises unless avoided in some mode prescribed by law, binds and concludes the whole world.'" Freeman on Judgments s. 608.

Neither the creditors nor the debtors of an alleged testatrix are affected by the allowance or disallowance of an instrument claimed to be her will. Their rights and liabilities remain the same in either event.

In *Stevens* v. *Joyal*, 48 Vt. 291, which was an appeal from the decree of the Probate Court decreeing the entire estate of Joseph E. Joyal to the defendant as his lawful widow, it was held that the widow was a competent witness to establish the fact of her marriage with her alleged husband. The same objection to her competency as a witness was raised in that case that is urged in this. It was necessary to establish her marriage to entitle her to take the estate as widow. The question there decided is identical in principal with the question under consideration. Adhering to the rule laid down in that case, we hold that Mrs. Hayes was a competent witness.

2. Under their plea of want of mental capacity to make a will, the contestants introduced evidence tending to show that prior to the execution of the alleged will, the testatrix was subject to insane manifestations as to her dress, and in her conversation, statements, acts and conduct, and especially in regard to her husband, by accusing him of improper intimacy with other women and of cruel treatment of her by abusive language and by strik-

ing and beating her, and that these accusations were not based upon fact or reason, but were insane delusions; that this insanity was progressive in its character until the forepart of January, 1876, when she was confined in an insane asylum at Brattleboro, where she remained until Feb. 12, 1876, when she was released, improved, and returned to her home, but that she continued insane to the time of her decease. On the other hand, the evidence of the proponents tended to show that from a child Mrs. Foster had been of a nervous temperament and had always been peculiar and eccentric in her character and conduct; that her peculiarities and eccentricities continued the same in their manifestations until the time of her decease, except in the fall and winter of 1875, when she was attacked with erysipelas, and while suffering from this disease she was more or less in an excited condition mentally, which was increased by the presence of her husband against whom she continued to make charges as before stated, and while in this condition she was sent to the asylum; that she was not then and never was insane, but that she was in an excited and delirious condition, which was temporary, and that after she returned to her home, she was sane and of sound and disposing mind to the time of her decease. To rebut the testimony of the contestants tending to show that the testatrix' views of her husband's treatment of her, and his conduct toward her and other women, were insane delusions, it was competent for the proponents to show acts of ill treatment by the husband, and his conduct, reputation and character with reference to other women, so far as such conduct, reputation and character were known to the testatrix. If she had reasonable grounds for her charges against him, resting on facts or his reputation known to her, her charges in these respects would not indicate that she was insane, or that the views she held or the charges she made had their origin in and were the delusions of a diseased mind. Hence on the issue thus raised by the contestants, all the testimony of the proponents excepted to by the contestants, tending to show her husband's ill

treatment, his improper conduct with other women, and his reputation in that respect in the community, which were known to her, was admissible.

The testimony of Dr. George Dunsmore, that soon after Mr. Foster's return from Europe, he treated him for a venereal disease, and the testimony of Mrs. Swett that Mrs. Foster informed her that Mr. Foster had a disease of a private nature that he contracted in Europe, bore directly upon this issue raised by the contestants, and was clearly admissible.

None of the contestants' exceptions to this class of testimony are well taken. To sustain them would preclude the proponents from rebutting an issue raised by the evidence of the contestants.

3. It is well settled in this State that the opinion of a witness not an expert, upon the question of sanity or insanity, is admissible, when based upon conversations or dealings which he has had with the person whose sanity of mind is in question, or upon the appearance of such person, or upon any other fact bearing upon his mental condition, within the witnesses's own knowledge and observation, he having first testified to such conversations, dealings, appearance or other observed facts, as the basis of his opinion. *Lester* v. *Pittsford*, 7 Vt. 158; *Morse* v. *Crawford*, 17 Vt. 499; *Cram* v. *Cram*, 33 Vt., 15; *Hathaway* v. *Nat. Life Ins. Co.*, 48 Vt. 335; *State* v. *Hayden*, 51 Vt. 296; *Chickering* v. *Brooks*, 61 Vt. 554; *In re* Henry Blood's Will, 62 Vt. 364. Such witness cannot be precluded from giving his opinion because the conversations, dealings or other observed facts, were of a limited rather than of an extended character, nor because he is unable to give the conversation, but can only state the manner in which the party conversed, *Cram* v. *Cram*, *supra*. It is for the jury to say what credit and weight are to be given to the opinion of such a witness in view of the extent and character of the conversations, dealings or other observed facts to which he has testified, as well as his character and intelligence and apparent interest or want of interest in the event of

the litigation. This rule disposes of the exceptions taken by the contestants to the admission of the opinion of this class of witnesses on the ground that the conversations, dealings or observation, constituting their knowledge of the testatrix, were too limited to render their opinion as to her sanity admissible.

It is contended that the form of the question to this class of witnesses in several cases, and in some instances to expert witnesses, was objectionable in that is called for the opinion of the witnesses in regard to the sanity or insanity of the testatrix, thus calling upon them to take the place of the jury, and determine the issue on trial in giving their opinion. The objection to these questions was general and did not call the attention of the court to the form of the question in this respect. When the subject matter of the inquiry is admissible, and only the form of the inquiry is objectionable, the objection must be so framed as to call the attention of the court directly to the precise defect in the form of the inquiry, otherwise such objection cannot avail the excepting party. Hence, if the questions were improper in the respect claimed, this objection cannot now avail the contestants.

However, when the question in issue is that of sanity or insanity, it is proper to ask a non-expert witness to give his opinion as to the person's sanity or insanity, based upon the facts concerning which he has testified. There is no difference in the rule permitting an expert or a non-expert witness to give his opinion in a case of this kind, except that the former is allowed to give his opinion upon facts testified to by other witnesses and which are assumed to be true, while the latter is limited to giving his opinion based upon the facts to which he has himself deposed. In neither case is the opinion evidence unless the jury find the facts proven, upon which it is based; if such facts are found, then such opinion is a fact for the jury to consider in connection with the other evidence, and the weight to be given it in the case of a non-expert witness is to be determined as above suggested, while in the case of the expert witness, its weight

must depend very largely upon his character, disinterestedness, intelligence, professional learning and skill. In *Hathaway* v. *National Life Ins. Co.* and *State* v. *Hayden*, *supra*, questions of the character objected to were permitted to be put to expert and non-expert witnesses, against the objection of the defendant, and this Court held that it was not error for the witness to state his opinion as to the sanity or insanity of the party, although that was the very question to be determined by the jury.

The attesting witness, Henry S. Goodrich, was asked by proponents this question: "Give your opinion as to her capacity to make a disposition of her property which she (meaning Mrs. Foster) does make by this will." It is not necessary to decide whether this question was admissible. The contestants objected to it "only on the ground that the witness had not seen her sufficiently to be able to judge." Where the objection is thus pointed out and stated in the exceptions, the excepting party is confined in this Court to the precise objection passed upon by the trial Court. *Bartlett* v. *Cabot*, 54 Vt. 242. There was no error in overruling this objection. We have carefully examined each of the numerous exceptions taken to this class of testimony by the contestants, and for the reasons stated, none of them are sustained.

4. The witness, Alice Mack, was shown to have been a nurse of the insane for many years, and to have had an extended experience in nursing the insane in private houses and in large institutions for the treatment of such patients in New York. She testified that she had seen and conversed with Mrs. Foster for an hour or two at a time on three different occasions, and that there was nothing in her manner to indicate impairment of the mind. She was then asked this question: "Do you think you could have sat and conversed with Mrs. Foster an hour and a half as you conversed with her, and not have discovered any insanity, if any existed in her?" The contestants objected to this question on two grounds; first, that no foundation had been

laid "for showing an answer to the question," and secondly, for the reason that it was leading. This exception cannot be sustained on either ground. The question was not leading. It did not indicate the answer desired. The Court might well have found that this witness was qualified to testify as an expert. *Mason* v. *Fuller*, 45 Vt. 29. The exceptions do not show whether the Court so found or not. If necessary to uphold the ruling of the court below, this Court would presume such finding. Upon the principles already announced, the question objected to was proper to be put to her as a non-expert witness after she had testified as stated. The objection was not to the form of the question in thus calling for her opinion as to the sanity or insanity of the testatrix. As already stated, the contestants are confined to the precise objection passed upon by the court below.

5. The testimony of the witness, Mrs. Cora Wood, as to the effect of the presence of Mr. Foster upon the testatrix when he came into the room where she was and what the testatrix then said in his presence, was properly admitted as a part of the *res gestae.*

6. Mrs. Eunice Catlin, a witness called by the contestants, testified in her examination-in-chief that she should call the testatrix insane many times, when she was unwell and when excited, basing this opinion in part upon what the testatrix said about her husband. It was not error on cross-examination to permit the witness to state what the complaint of the testatrix against her husband was, which the witness considered in forming her opinion that the testatrix was insane. It was the right of the proponents to have the jury fully know all the facts, so far as she was able to state them, on which she based her opinion.

7. The witness, Merrill J. Hill, was permitted to testify that the testatrix appeared before him as a Master in Chancery in 1877, afew weeks after she was released from the asylum, and gave testimony in the case of *Hoyt* v. *Dewey*, which he took in

writing, and to state the circumstances under which the witness gave her testimony, her appearance and deportment at the time, and to state what questions were asked her by counsel in that case and the answers which she then gave to those questions, for the purpose of establishing a basis for his opinion as to her mental condition at that time. After having thus testified, he stated that he saw nothing in the deposition or on the occasion of giving it that indicated the presence of insanity in Mrs. Foster. This testimony was clearly admissible under the rule already laid down. It related to a period of time during which the contestants claim that Mrs. Foster was insane.

8. To rebut the testimony of Merrill J. Hill, the contestants offered "to show that Governor Underwood and others, while inmates of the asylum as insane persons, had given intelligent depositions and had been permitted to testify in Court." The Court properly excluded the testimony offered. It did not relate directly or indirectly to Mrs. Foster's condition at the time she gave her testimony before Mr. Hill. It was also open to the objection that it raised a new and immaterial issue in the case. If admitted it involved the inquiry into and a controversy over the precise mental condition of Governor Underwood and the other persons referred to, at the time they gave their depositions, and the character of the depositions, which might result in establishing that they were not insane when they gave their depositions, or if then insane, that their insanity was of a character entirely different from the alleged insanity of Mrs. Foster. To enter upon the trial of such immaterial side issues, would divert the minds of the jury from the real issue involved, prolong the trial indefinitely and defeat rather than promote justice. *Weeks* v. *Lyndon*, 54 Vt. 638

9. A. P. Cross, a witness improved by the contestants, testified that he was the attorney of the testatrix for some time after her husband's death in November, 1885.

After detailing the conversations and business transactions which he had with her as her attorney during that time, he testi-

fied that in his opinion she was not then sane. One of the transactions forming the basis of this opinion, was the making by him and the signing by Mrs. Foster of a petition to the Probate Court for an allowance to her as widow from her husband's estate. On cross-examination Mr. Cross stated that although he did not remember, he presumed he read this petition to Mrs. Foster; that she and Mrs. Hayes were in his office when he drew it, and they had the bills there with them mentioned in the petition. Against the exception of the contestants, the Court admitted this petition in evidence. It was admissible as a part of the *res gestae* forming the basis of Mr. Cross' opinion as to her insanity. The proponents had a right to have it go to the jury that it might fully appear just what the transaction was in which she was then engaged, as it might modify the weight the jury would give to Mr. Cross' opinion as to her mental condition at the time in question.

10. The issue of undue influence, as well as that of her insanity, involves the mental condition of the testatrix. A person of a weak, flighty, vacillating mind, may be unduly influenced by what would not in the least move to action a strong, well balanced mind. Most of the testimony in regard to the mental condition of the testatrix, therefore, also bore upon this issue. The issue of undue influence also involved the relations of the testatrix with and her feeling toward the contestants and those who are named as the objects of her bounty in the instrument proposed for probate. The fact, unexplained, that she made no provision for her half brother, and only to a very limited extent for her own sister, in the proposed instrument, would have a tendency to show that it was the product of undue influence. If, however, her relations with and her feelings toward the objects of her bounty were such that the attempted disposition of her property was not unnatural, the fact that she thus passed over near relatives, would not tend to prove undue influence. As tending to show her relations and feelings in this behalf, the

fifteen letters, all of which had been in her hands, under such circumstances as to show that she must have known their contentents, were admitted. The jury were carefully instructed to make no other use of them. For this purpose these letters were clearly admissible. Several of them were written during the time the testatrix was confined in the insane asylum, and disclose the views and feelings which the writers entertained in regard to that confinement. These views and feelings were such as would be likely to exert an abiding influence upon the testatrix, when known to her. It was her knowledge of their contents which rendered them admissible in this respect.

The letters written by the testatrix were admissible, not only to show her state of mind toward the contestants and those named as the objects of her bounty, but also to show her mental condition and capacity.

11. It was not error to allow Mrs. Hayes to explain the circumstances under which she wrote the letter introduced by the contestants and the meaning which she intended to convey by the language used. This is a privilege usually accorded to any witness or party. The purpose of allowing such explanation, is to enable the jury to consider the circumstances from the same standpoint as the witness. *Brackett* v. *Wait*, 6 Vt. 411; *Noyes* v. *Canfield*, 27 Vt. 79; *Gifford* v. *Thomas' Est.*, 62 Vt. 34. The contestants eventually laid great stress upon the word "hallucination" as used in this letter, and probably urged to the jury that it was used by the writer to charge Mrs. Foster with being insane. The fact that the primary meaning of hallucination, as defined by Webster and Worcester, is, "an error, a blunder, a mistake, a fallacy," brings the ruling of the County Court permitting an explanation of the sense in which the writer used that word, clearly within the rule stated in the cases cited.

12. Dr. Geo. Foote, a witness for the proponents, was permitted to testify that he knew of the fact that Mrs. Foster was confined in an asylum from what Mrs. Hayes told him, and that

Mrs. Hayes requested him to assist her and take Mrs. Foster into his institution and remove her from Brattleboro. All the acts of Mrs. Hayes in behalf of the testatrix so far as known to her were admissible to enable the jury to determine whether the disposition she made of her property in respect to Mrs. Hayes was natural and probable, and to rebut any inference of undue influence on the part of Mrs. Hayes. Her having interested Dr. Foote in Mrs. Foster's behalf while the latter was confined in the asylum, bore directly upon this issue. The contestants excepted to the admission of this testimony and now insist that it was error to admit it, because the exceptions do not show that the facts stated by him ever came to the knowledge of Mrs. Foster. In *Beard* v. *Murphy*, 37 Vt. 99, Poland, C. J. says: "We cannot manufacture or imagine errors for the purpose of correcting them. The party claiming that an error has been committed upon the trial against his legal rights, must make it appear affirmatively upon the record."

In *Boutelle* v. *Fire Ins. Co.*, 51 Vt. 4, it was a material question whether defendant's agent, Brown, heard a conversation between one Mills and the agent of another insurance company, had in the plaintiff's storehouse, while Brown was outside of it. Against the exception of the defendant, Mills was permitted to testify to the conversation he had with this agent while in the storehouse. In disposing of this exception, this Court by Ross, J., say: "It does not appear from the exceptions, that Brown was so far removed from the witness at the time of the conversation that he could not have heard the same.

If the conversation was in his hearing and so in his presence, it was admissible. It is incumbent on the excepting party to show that the evidence objected to was clearly inadmissible. This is not shown by the exceptions." In *Armstrong* v. *Noble*, 55 Vt. 428, which was an action of assumpsit on a promissory note endorsed to plaintiff when over due, it was urged in this Court that the exceptions did not show that certain evidence received was

admissible in support of the defence made. In the opinion delivered by Ross, J., the Court say: "But there may have been something in this evidence that tended to connect this phase of the defence with the note. This Court will not presume there was not, in order to find error in the action of the County Court in admitting this testimony." In the same case, the question also arose whether the wife of the payee of the note was a competent witness. She was permitted to testify at the trial below against the exception of the plaintiff. Neither the facts nor the pleadings showed that her husband had any interest in the event of the suit, and unless he was thus interested, she was a competent witness. In overruling this exception, the Court further said: "As has been frequently held and announced, error must appear upon the face of the exceptions. Every reasonable intendment is to be made in favor of the judgment of the County Court. It is for errors that appear upon the exceptions, and not for errors that rest on the assertion of counsel, that judgments are reversed. It is possible that the payee of the note is the real plaintiff. If not the real plaintiff, it is possible that he transferred it in such a way that he is legally bound to make good to the plaintiff whatever was apparently due upon the note at the time of the transfer. But there is no statement in the exceptions that either possibility is a reality. This Court would commit a grave error if it should reverse a judgment of the County Court upon a *conjecture.*" In *Tenney* v. *Harvey*, 63 Vt. 520, the question arose whether there was error in admitting certain evidence against the defendant's exception, and the Court say: "If this evidence was admissible under any conceivible state of the evidence not disclosed by the exceptions, then there was no error in admitting it." Among the more recent cases to the same effect are, *Clary* v. *Willey*, 49 Vt. 55; *Bradley* v. *Andrews*, 51 Vt. 525; *Gibson* v. *Vail*, 53 Vt. 476; *Burnham* v. *Jenness*, 54 Vt. 272; *Eames* v. *Brattleboro*, 54 Vt. 471; *Melendy* v. *Spaulding*, 54 Vt. 517; *Weeks* v. *Lyndon*, 54 Vt.

638; *Brownell* v. *R. R. Co.*, 55 Vt. 218; *McNeish* v. *The U. S. Hulless Oat Co.*, 57 Vt. 316; *Knight* v. *Smythe*, 57 Vt. 532; *Partch* v. *Spooner*, 57 Vt. 583; *Rawson* v. *Prior*, 57 Vt. 612; *State* v. *Nulty*, 57 Vt. 543; *Spaulding* v. *Warner*, 57 Vt. 654; *Reynolds* v. *Conway*, 61 Vt. 313; *Baker* v. *Ufford*, 63 Vt. 133. We think the true rule is, that to assign legal error in the admission of testimony, the exceptions must show affirmatively that, "in the then present aspect of the case," the testimony received was not admissible, unless accompanied with an offer to introduce other evidence which would make it admissible. *Conn. & Pass, R. R. Co.* v. *Baxter*, 32 Vt. 805; *Gifford* v. *Thomas'* Est. 62 Vt. 34. The rule is incorrectly stated in *State* v. *Hopkins*, 50 Vt. 330, in that the element of "the then present aspect of the case" when the testimony is offered, is omitted. It is difficult to see how there was occasion for the Court to attempt to state this rule in that case in deciding the question it then had under consideration. The respondent was indicted for forging, and uttering a draft on the Fire Association of Philadelphia, payable to one Green. The uttering of the bill was admitted and the only question was as to the genuineness of Green's signature thereto. The State was permitted to show when the Fire Association "*became convinced*" that the name of Green upon the back of the draft was a forgery. The Court held that this was in substance getting into the case as evidence, the opinion of the Fire Association upon the question of the genuineness of Green's signature, and as to the guilt of the respondent, and that it was inadmissible.

As it does not appear affirmatively by the exceptions that when this testimony of Dr. Foote was admitted, there was no evidence tending to show that Mrs. Foster had knowledge of what occured between him and Mrs. Hayes as testified by him, this exception, under the rule stated, cannot avail the contestants. To hold otherwise would require us to overrule all the cases cited, as well as many other decisions of this Court to the same effect.

13. Dr. Draper was in charge of the asylum while Mrs. Foster was confined there, and he was improved as a witness and expert by the contestants, and testified as to her condition at that time.

The proponents improved Dr. Foote as a witness and an expert in rebuttal. He stated that he had read the hypothetical question which the contestants had asked Dr. Draper, and had also read his testimony. The proponents against the exception of the contestants then asked this question: "Supposing Dr. Draper's diagnosis of the case to have been correct in 1876, and supposing that these facts referred to in the hypothetical question were true and that they occured after she left the hospital, what evidence would they present to your mind, and supplement that with the knowledge you have of Mrs. Foster, what answer would you make to the question?" The contestants first introduced expert witnesses on the subject of insanity to whom they put hypothetical questions. It is conceded that this gave the proponents the right to use the same kind of testimony in rebuttal, but it is contended that they should have been confined to the use of the same hypothetical questions which the contestants had used, and that it was therefore error to allow this question to be put to Dr. Foote. This contention cannot be sustained. The proponents might judge that some of the facts included in the hypothetical questions used by the contestants, would not be found by the jury, or that facts not included in such questions, but which the evidence tended to show, would be found to be established, and they had the right to so frame their questions as to call for the opinion of their expert witnesses upon any or all the facts which the evidence tended to prove.

It is now urged that this question did not limit Dr. Foote's knowledge of Mrs. Foster to what he had testified in respect to what he had known of her, and that in this there was error. We do not think that this is a fair construction to put upon the question. The language of an inquiry is always to be construed

so as to have and be given meaning with reference to the circumstances under which it is used. Dr. Foote had known Mrs. Foster more or less intimately from her birth. She had lived in his father's family for several years and had attended school for some time at another place where he was the principal. Before this question was asked him, he had testified fully as to all he knew respecting her from his earliest acquaintance with her to her death. In view of these facts, the question cannot fairly be said to refer to or include any knowledge on his part, except that which he had already stated in his testimony. We think both the Court and counsel at the time, rightly and naturally understood the question to refer to and include only such knowledge on his part. In *Johnson* v. *Cent. Vt. R. R. Co.*, 56 Vt. 707, Dr. Ray, an expert witness improved by the plaintiff and who had visited and examined the plaintiff on three occasions, against the defendant's exception was asked: "From what you have known of this case heretofore, and what you have learned of his condition here to-day, what do you say about his being able to do heavy work?" The objection to that question was put on substantially the same ground as the one under consideration, but was not sustained. In overruling it the Court said: "The obvious and natural construction that would be put upon the language of the question, would be, that he was required to give an opinion based upon what he had learned of his condition at the examinations that he had testified he made."

This case is directly in point, and we hold that although the question put to Dr. Foote was somewhat inartificial in form, yet it was admissible in view of the circumstances under which it was asked and admitted. If the question was proper, its admission would not be error because the witness misunderstood it or gave an improper answer. *Fraray* v. *Gusha*, 59 Vt. 257. The presiding Judge in his charge instructed the jury that the opinion of expert witnesses would go for nothing unless they found the facts established on which such opinion was based. Expert

testimony is necessarily admitted subject to the condition or possibility that the assumed facts on which it is based, may or may not be found by the jury to be proven.

The contestants did not specifically object to the form of this question.

Again, in the discussion upon the admissibility of this evidence and which immediately preceded the ruling of the Court admitting it and the asking of this question under that ruling, the contestants put their objection solely upon the ground that the same question, and that only, which was put to Dr. Draper could be put to Dr. Foote in rebuttal, and we think the Court had a right to understand from what then occurred and did understand the objection to the question to be made on that ground only. This would limit the exception, if well taken, to the precise ground then stated, which as we have already seen is not tenable.

It was competent for the contestants to have inquired of Dr. Foote what his opinion was as to Mrs. Foster's sanity or insanity, based upon the testimony of each witness who had testified to facts tending to prove sanity or insanity, assuming such testimony to be true. *State* v. *Hayden*, 51 Vt. 296. He testified that he had heard Mrs. Dickerson's testimony. The Court then allowed the proponents, subject to the exception of the contestants, to ask him the question: "What do those declarations of Mrs. Foster, testified to by Mrs. Dickerson, indicate to your mind as to her mental condition, assuming that Mrs. Dickerson testified to the truth?" and to which he replied, "I do not see anything that would indicate insanity in the answer that was given." It is now urged that this question was inadmissible, and that the only question permissible in view of the evidence, was a hypothetical one, enumerating the facts and declarations testified to by Mrs. Dickerson, and assuming them to be true. This question did not require the witness to weigh or reconcile conflicting evidence. In *State* v. *Hayden*, *supra*,

it was expressly held that it was not error to permit the question to be put in the form in which it was. In support of this exception, it is also argued that the jury could not have a correct idea of the question and answer without having their recollection of Mrs. Dickerson's testimony refreshed by embodying it in a hypothetical question. In reply to this argument, it need only be said that this Court cannot say as a matter of law that a jury cannot or will not understand and remember the questions put to witnesses, and their answers thereto. Every time a case is submitted to a jury, it is presumed that they will remember the evidence given by witnesses and the law applicable to the case as stated by the Court, and that they will properly weigh the former and apply the latter so as to return a just and legal verdict. In fact, every jury trial, from its beginning to its end, proceeds upon the theory and the presumption that the jury have constantly in mind all the testimony, including questions as well as answers thereto, which has been admitted at any stage of the trial. Should the trial court deem it necessary or expedient to refresh the recollection of the jury as to the testimony admitted, it can cause it to be done as a matter wholly within its discretion.

14. The contestants introduced the testimony of Dr. Fassett, one of the physicians who certified to the insanity of the testatrix at the time she was comitted to the insane asylum. He testified that he had no doubt as to her being insane at that time. He further stated that he did not know that he saw her after her return from the asylum until April, 1879, but from that time to the death of her husband in November, 1885, he saw her from time to time and occasionally treated her professionally. He narrated fully all he observed and learned in regard to her physical and mental condition during this period. Subsequent to the time he made the certificate, he made no examination of her with a view of determining her sanity or insanity, and was not asked to give

his opinion, and did not give it, as to her sanity or insanity, after she was released from the asylum.

Dr. Hamilton, a physician and expert, improved by the proponents in rebuttal, was asked in his direct examination the question: "Assuming the condition of Mrs. Foster to have been as stated by Dr. Fassett, what do you say about her recovery from this disease of the mind which she might have had in 1876, if she had any?" The contestants objected to this question, and insisted that the witness should take the *whole testimony* of Dr. Fassett as the basis of his answer. The Court then said to the witness: "Assuming she was crazy in 1876, what is your opinion of her having recovered at that time in 1885, taking it just as Dr. Fassett states it, if you have read his deposition?" The witness stating that he had not read the whole deposition, the question put by the Court was left open, and later, the witness having read the entire deposition, was recalled and the question again asked, against the exception of the contestants, and the answer, "I should say she had recovered," was admitted.

It is now urged that this was error, for the reason that the opinion and conclusions of Dr. Fassett were made a part of the basis of the opinion of Dr. Hamilton. We think the question only called for Dr. Hamilton's opinion upon the facts to which Dr. Fassett had deposed, showing the physical and mental condition of Mrs. Foster from April, 1879, to Nov., 1885, as bearing upon the question whether she had recovered in 1885, assuming that she was insane in 1876, as claimed by the contestants. If this were not the fair, natural construction to be put upon this question, and were it open to the objection claimed, the contestants could take nothing by their exception on this ground, for the reason that they insisted that Dr. Hamilton should predicate his opinion upon the *whole testimony* of Dr. Fassett, including his opinion as well as the facts stated by him. It would indeed be a strange proceeding to permit a party in the court below to insist upon a modification of a question so that it conforms to his

views, and having thus obtained such modification, to then allow him to set it up in this Court as reversible error. Such is not the law. *Tucker* v. *Baldwin*, 13 Conn. 136, (33 Am. Dec. 384); *Minot* v. *Mitchell*, 30 Ind. 228, (95 Am. Dec. 685).

Again, were the question open to the objection urged, the error would be in favor of the contestants, as the opinion of Dr. Fassett so far as expressed in regard to Mrs. Foster's sanity or insanity, supported their claim that she was insane. If Dr. Hamilton gave this opinion any weight, it would make for them. "A party shall not reverse a judgment for an error which is beneficial to him." *Brown* v. *Caldwell*, 10 Serg. & Rawle 114, (13 Am. Dec. 660); *McGowen* v. *West*, 7 Mo. 569, (38 Am. Dec. 468); *People* v. *Call*, 1 Denio 120, (43 Am. Dec. 655); *Lucas* v. *New Bedford & Taunton R. R. Co.*, 6 Gray 64, (66 Am. Dec. 406). "This court never reverses a judgment because of errors in the proceedings in the County Court which have in no wise harmed the excepting party." *Sampson* v. *Warner*, 48 Vt. 247; *Wheelock* v. *Moulton*, 13 Vt. 430; *State* v. *Kibling*, 63 Vt. 636.

The views already expressed in this connection and in regard to Dr. Foote's testimony, dispose of the remaining exceptions taken to the admission of Dr. Hamilton's and Dr. Clark's testimony.

15. The contestants excepted to the proponents being allowed to read in evidence the first five questions and answers of the testimony of Mrs. French, given in rebuttal before the Probate Court. The case had been fully tried in the Probate Court and full minutes of the testimony taken by a stenographer who had furnished a copy thereof to the Probate Court. The parties entered into a stipulation by which it was agreed that the testimony so taken and used before the Probate Court, of witnesses that were deceased, or unable to attend Court by reason of sickness or accident, or absent from this State at the time of the trial in the County Court, might be read from the copy of their testimony furnished the Probate Court, to the same extent

that such witnesses might testify under the law and rules governing the admission and rejection of evidence, if they were present in court and improved as witnesses. It was further stipulated that the witness, Mrs. French, at the option of the proponents, should be considered unable to attend court by reason of sickness. The proponents in their opening called her, and she testified upon several material issues and was fully cross-examined. The witness was about ninety years old, and infirm, and after her testimony in the opening was given, she was obliged to go to and remain at her home in Bennington on account of her infirm health, which was apparent while she was in court. Her testimony before the Probate Court, which was read in evidence, was material only on the question of undue influence, an issue raised on trial by the contestants' evidence, and which was an issue that the proponents in the opening of their case were not required to make by their evidence or to forefend against. Until it was raised by the evidence of the contestants, her testimony on this issue was inadmissible, if objected to. A stipulation of this kind is not to be construed strictly like a plea in abatement or other dilatory pleadings, but fairly and liberally in view of the intention and purpose of the parties in making it, and for the furtherance of justice.

When the parties entered into it they were acquainted with her and knew her great age and infirm health, as well as the distance she would have to travel to attend court, and were well aware that humanity on their part as well as prudence on her own, might require that she should not be compelled to appear in court, although she might possibly be physically able to do so. We do not think that the provision, that, at the option of the proponents, she should be considered unable to attend court by reason of sickness, was intended as a restriction, but as an enlargement of their right to use her testimony given in the Probate Court, and its effect was to give them the right, at any stage of the trial, to use so much of such testimony as was relevent to

any material issue, and concerning which she had not testified in the County court, without regard to whether she was able to attend court at the time such testimony became material and was offered in evidence. Under this view of the matter, the testimony was properly admitted.

Again, by the express terms of the stipulation, the testimony taken and used before the Probate Court, of a witness, "*unable to attend court by reason of sickness*," might be read in evidence at the trial in the County Court. There was no limitation as to the time when such sickness must supervene; hence, if at the time the testimony became material and was offered in evidence, the witness was unable to attend by reason of sickness, his testimony taken before the Probate Court was then admissible under the stipulation, without regard to whether he had previously been present at the trial in the County Court and testified upon some branch or phase of the case. In other words, whenever, during the trial, it became necessary for either party to offer in evidence any part of such testimony, one of the tests of its admisibility under the stipulation was this: "Is the witness unable to attend court by reason of sickness?" If so, his testimony was admissible under the stipulation. This provision applied to Mrs. French as well as to all other witnesses who might be unable to attend court for this reason. Before admitting this testimony, the trial court found the fact that she was then unable to attend court by reason of sickness. When admitted, this testimony was material and only admissible in rebuttal at that time, as before stated.

In their brief the contestants say: "The proponents having procured the attendance of this witness, and examined her as a witness, *made their option and were bound by it.*" This is the only reason which they give for sustaining this exception. The option which the proponents had the right to exercise, was to treat her as unable to attend by reason of sickness, although she was in fact in such health as to be able to attend. It would be a

perversion of language, as well as strange logic to hold that by securing her attendance at the trial during such time as she was able to attend, they thereby elected to exercise their option to treat her as unable to attend. This option could only be exercised by not having her present at court when she was able to be there. It could be exercised only during such time as Mrs. French was in fact able to attend court, and it was the right to treat her as sick when she was in fact well. When she became sick, and thereby unable to attend court, there was then nothing in her condition to which the option could apply. When offered and admitted, this testimony had become admissible under another provision of the stipulation, which was that she was unable to attend Court by reason of sickness. The proponents had a right to avail themselves of each and of all causes for which it was stipulated this testimony might be used.

This exception cannot be sustained for another reason. Where parties litigant enter into a stipulation of this kind, and disagreeing as to its effect, it becomes necessary for the trial court to construe it to determine the admissibility of evidence offered under it, no exception lies to the ruling of the Court construing such stipulation, if it is fairly susceptible of the construction put upon it by the Court. This stipulation was fairly susceptible of the construction which the court below must have given it, in order to admit this testimony.

16. It was not error in the charge to state to the jury the standard of duty of a person who puts his name as a subscribing witness to a will as defined by a great Chancellor After stating this standard, the learned Judge immediately instructed the jury that while this standard of duty was plainly proper, it was rarely obtained or observed in fact by the general run of subscribing witnesses, and that it was for them to say how far it had been in the case on trial. In this connection, speaking of witnesses whose evidence bore upon the question of mental capacity, the Court had also told the jury that "ordinarily those who came nearest to

the very time of making the will would be most valuable, if, in applying the tests of truth to these as to all witnesses, they seem to be worthy of credit. Therefore the testimony of the subscribing witnesses to the will is to be carefully considered and scrutinized." By this instruction the weight to be given to the testimony of this class of witnesses was left wholly to the determination of the jury, subject to the same tests of truth and the same inquiry as to their knowledge of the facts to which they deposed as was to be applied to other witnesses who had a like opportunity to observe and know the testatrix at or near the time of the execution of the instrument proposed for probate. The jury were not, as claimed by contestants' counsel, in effect told that the testimony of an attesting witness was entitled to greater weight than other witnesses having the same means of knowledge, and we do not think that they could have so understood the charge.

17. Declarations of the testatrix made after the execution of the proposed instrument, were given in evidence, and in regard to their bearing upon the question of capacity, the Court instructed the jury that "subsequent declarations are admissible in behalf of the contestants in support of the issue of incapacity or undue influence providing they tend to show incapacity at the time they were made, but if they have no tendency to prove such contemporaneous incapacity, they are not admissible against the will." It will be observed that the learned Judge used the identical language of this Court in delivering its opinion in *Crocker* v. *Chase*, 57 Vt. 420. It is now urged that this was error for the reason that the jury must have understood from this language that they were not at liberty to consider her declarations made subsequent to the making of her will upon the question of her relation to the beneficiaries under the will and the contestants. This contention is not sound. The charge is to be considered as a whole. This part of it was specifically limited in its application to the question of mental capacity and the jury must have so understood it. The jury had already been instruct-

ed as follows: "The proposition that Mrs. Foster's declarations are only to be considered on the question of mental capacity has some exceptions. Her declarations tending to show knowledge on her part of the existence of a fact otherwise established were admissible, and are to be considered as evidence of such knowledge; this applies to her declarations that she knew of the reputation of her husband as to his conduct with other women. Her declarations also tending to show her feelings toward the different parties to this matter were admissible, and are to be considered as evidence of such feelings." After stating the rule respecting her subsequent declarations as evidence on the question of mental capacity, and in connection therewith, the Court also said to the jury: "But as I think I have before stated, her declarations as to her intentions in the disposition of her property are proper to be regarded as tending to show that the testatrix intended to make a disposition of her property similar to that which she did make; and declarations at the time the will is being made are admissible as a part of the act then being done. Her declarations as to feelings towards these relatives interested in this controversy were also admissible to show the fact of her feelings, and this whether these declarations were in letters, or made by word of mouth to individuals." The jury could not have been told in more apt language that they were to consider all the testatrix's declarations, whenever made, in determining the question of her affection for or prejudice against any of the parties interested in this controversy.

18. The contestants presented twenty-one requests for instructions to the jury. Under the holding of this Court in *Westmore* v. *Sheffield*, 56 Vt. 239 and *State* v. *Hopkins*, 56 Vt. 250, the Court might well have declined to consider or comply with any of them on account of their great number and varied character. The contestants now complain that the Court did not comply with their 8th, 9th, 10th and 12th requests, but we think this complaint groundless. The Court fully complied with

them, by reading them to the jury and telling them in effect that they embodied good law. If the contestants desired further instructions on the points embraced in these requests, they should have asked for such further instructions at the close of the charge. This they failed to do.

19. The contestants excepted to the charge "in regard to undue influence with direct reference to the will," and to all the Court said "upon the subject of proving undue influence."

To set aside a will on the ground of undue influence, it must be established that the influence was exerted upon the very act of making the will. The fact that the testator was under the general and even controling influence of another person in the conduct of his affairs, will not suffice to invalidate the will, unless that influence was intentionally and specifically exerted upon the testatmentary act. *Small* v. *Small*, 4 Greenl. 220; S. C. 16 Am. Dec. 253 and note; *Trost* v. *Dingler*, 118 Penn. St. 259 (4 Am. St. Rep. 593); 1 Redf. on Wills (3rd Ed.) 480, 487.

The degree of influence necessary to be exerted over the mind of a testator to render it undue influence, must be such as to induce him to act contrary to his wishes, and to make a will and disposition of his property other than he would have made if left entirely to his own discretion and judgment. His free agency and independence must be overcome and he must by some domination or control exercised over his mind, be constrained to do what is against his will, and what he is unable to refuse and too weak to resist. A moderate and reasonable solicitation, entreaty and persuasion, though yielded to, if done intelligently, without constraint, and from a sense of duty will not vitiate a will, if in other respects valid. *Appeal of Dale*, 57 Conn. 127; (17 Atl. Rep. 757.) In *Gilbert* v. *Gilbert*, 22 Ala. 529 (58 Am. Dec. 258) what constitutes undue influence is well stated as follows: "Undue influence, legally speaking, must be such as in some measure, destroys the free agency of the testator; it

must be sufficient to prevent the exercise of that discretion which the law requires in relation to every testamentary disposition. It is not enough that the testator is dissuaded by solicitations or arguments from disposing of his property as he had previously intended; he may yield to the persuasions of affection or attachment, and allow their sway to be exerted over his mind; and in neither of these cases would the law regard the influence as undue. To amount to this, it must be equivalent to moral coercion—it must constrain its subject to do what is against his will, but which from fear, the desire of peace, or some other feeling, he is unable to resist, and when this is so, the act which is the result of that influence is vitiated." *Thornton's Exrs.* v. *Thornton's Heirs*, 39 Vt. 122; *Small* v. *Small*, 4 Greenl. 220; S. C. 16 Am. Dec. 253 and note; *Woodard* v. *James*, 3 Strob. L, 552, (51 Am. Dec. 649); *Taylor* v. *Kelly*, 31 Ala. 59 (68 Am. Dec. 150); 1 Redf. on Wills (3rd Ed.) 484,–487.

We think the charge fairly, clearly and correctly states the law applicable to this branch of the case. The jury could not have understood, from any language used by the learned Judge, as is now urged by the contestants, that there must be direct proof of undue influence in respect to the will, and that influence and control in matters not connected with the will, the relation of the parties, the surroundings of the testatrix, and the will itself, were not to be considered as evidence tending to show undue influence in respect to the will. They were distinctly told that undue influence might be established like other facts by circumstantial evidence, and that ordinarily it must depend more or less upon that kind of evidence. The relations of Mrs. Hayes and the other legatees of the will to the testatrix, their control over her as to her business and her household and personal matters, her condition of mind and body, the provisions of the will and all other circumstances which the contestants claimed tended to prove undue influence, were called to the attention of the jury, and they were left to decide the question

of undue influence upon all these facts taken together. In addition to this, the Court said to them: "If you should find from the evidence that at and about the time when the will was executed the testatrix was, in other important particulars, so under the influence of the donees in the will, that as to them she was not a free agent, but was acting under undue influence, then that is a fact to be considered with other facts satisfactorily proved on the claim of undue influence as to the will itself, * * * it is for you to say whether upon all the evidence in the case the defendants have established by a fair balance of proof, that is, have they fairly satisfied you that this proposed will was induced by undue influence of the persons charged."

The Court was not bound to tell the jury just how much evidence would be sufficient to sustain a verdict upon the ground of undue influence as requested by the contestants' 14th, 17th and 18th requests. "It was not the duty of the Court to isolate a part of the case from the other facts which affect it, and make this unreal case the subject on one separate branch of his charge." When it submitted to the jury on this subject all the facts bearing upon it, as it did, it performed its full duty. *Thornton's Exrs.* v. *Thornton's Heirs, supra.*

This disposes of all the exceptions urged in this Court.

Judgment affirmed with costs. Judgment to be certified to the Probate Court.

Ross, Ch. J., dissents as to points 12, 13, and 15.

Dissenting views of

ROSS, Ch. J. While I concur in the decision of most of the points covered by the opinion, I dissent with reference to a few points.

Point 12, relates to the exception taken to the testimony of Dr. George Foote, and is stated in the exceptions as follows: "Dr. George Foote, a witness introduced by the proponents, was allowed to testify subject to the objection and exception of the contestants, that he knew of the fact that Mrs. Foster was con-

fined in an asylum from what Mrs. Hayes told him, and that she, Mrs. Hayes, requested him to assist her and take Mrs. Foster into his, Dr. Foote's, institution and to remove her from Brattleboro. Dr. Foote's testimony, pp. 51 and 52, may be referred to." This is the entire allusion in the exceptions to this point. Recurring to the stenographer's minutes, we find this, "Q. You have just mentioned a circumstance? A. Yes, sir; I learned. (Objection interposed). Q. You have mentioned a circumstance of Mrs. Foster's being in an asylum in 1876. A. Yes, sir. Q. How did you come to know that? A. From this fact, that Mrs. Hayes come to me to have me—, Objection interposed.

Mr. Hayes. The line of this examination is this: We think it competent to show in explanation of the will that it was made in recognition of a very great service rendered by Mrs. Hayes in 1876, when she befriended Mrs. Foster and she enlisted the services of Dr. Foote at that time, and we offer it to show that the will ran along in the line of her intentions, and as showing the motive of the will, and we confine it to that issue.

The Court. It should be limited to showing the relations that existed between Mrs. Foster and the natural objects of her bounty.

Mr. Hall. We object to this witness testifying what Mrs. Hayes did and said to him in reference to this matter.

The Court. He proposes only to call out the knowledge of the witness in respect to the attitude of Mrs. Hayes towards Mrs. Foster so far as he knows it.

Q. Do you know of any act of Mrs. Hayes in 1876 which was directed towards the relief of Mrs. Foster? A. I do. Q. What was it? A. She came to my asylum, Mrs. Hayes did, and requested me to assist in—

(Mr. Hall. We desire an exception.)

and take Mrs. Foster into my institution and remove her from Brattleboro."

This is all that the copy by the stenographer contains on this subject. It will be observed that the offer made by the proponents' counsel does not claim that this testimony was admissible on the ground that it had already been shown that this action by Mrs. Hayes had come to the knowledge of Mrs. Foster, nor on the ground that they expected to show such knowledge by subsequent testimony. The ruling of the Court admitting it does not require such knowledge to be shown, antecedently, or subsequently. The offer and ruling treat it as admissible standing alone, and disconnected from any evidence to show that Mrs. Foster knew of these acts of Mrs. Hayes. We are all agreed, that these acts of Mrs. Hayes could not properly be shown unless they were known to Mrs. Foster. They could not influence her in making her will in favor of Mrs. Hayes against her own sister, unless so known. The opinion after reviewing several cases and citing others concludes: "As it does not appear affirmatively by the exceptions that when this testimony of Dr. Foote was admitted, there was no evidence tending to show that Mrs. Foster had knowledge of what occurred between him and Mrs. Hayes, as testified by him, this exception under the rule stated cannot avail contestants." The rule referred to is thus stated: "We think the true rule is, that to assign legal error in the admission of testimony, the exceptions must show affirmatively that 'in the then present aspect of the case' the testimony received was not admissible, unless accompanied with an offer to introduce other evidence which would make it admissible." Which, as it is applied to this case, means that when testimony is offered inadmissible, unless supported by other testimony, and when the exceptions make no mention of any such supporting testimony, but do not specifically state that no such supporting testimony was offered or admitted, the Court will presume that such supporting testimony was offered and admitted. This requires a bill of exceptions, to avail the excepting party, when such testimony is admitted against his objection, to be drawn with the certainty

of a plea in abatement, or so as to negate every possible state of the testimony that might render the testimony objected to admissible. I never have understood that exceptions were required to be drawn with such certainty, for any purpose. This Court said, in *Westford* v. *Essex*, 31 Vt. 461: "Exceptions are not to stand upon the footing of pleadings, where no intendment is to be made in favor of the party thus setting up his right, but are to be understood in the usual and ordinary sense of common communication, a plain statement of the facts for both parties for the Court to apply and declare the law arising upon them."

In *Conn. & Pass. R. R. R. Co.* v. *Baxter*, 32 Vt. 815, this Court said in reference to the admission of this class of testimony: "We think that in all cases where testimony is offered that in the present aspect of the case is inadmissible, unaccompanied with any assertion on the part of the attorney offering it, that he intends, and expects to introduce other evidence, which, when in, will make such testimony admissible, the testimony, if objected to, should be rejected, and to admit it is error that is not cured by the Court's directing the jury in their charge to lay it out of the case."

Applying these two rules to the exceptions in this case on this subject, I think this Court is to pass upon this exception just as it is left by the exceptions, making no presumption in favor, or against, the excepting or prevailing party. When so applied, error is manifest. No presumption has to be made or negated to show error. The opinion places stress upon the clause, "in the then present aspect of the case," contained in the extract from the opinion in *Conn. & Pass. R. R. R. Co.* v. *Baxter*, *supra*. But by the rule taken from *Westford* v. *Essex*, the exceptions give this Court, "the then present aspect of the case" in which the objectionable testimony was received. They are a common communication drawn up for that purpose. I agree that error must affirmatively appear from the exceptions as drawn, but not as against every conceivable state of the case

which might possibly have appeared but is not stated to have appeared. This Court is to base its judgment upon the record as made by the exceptions.

I think a careful inspection of the cases cited in the opinion will show that not more than one of them, if one, support the opinion, when the laguage used, and relied upon for support, is read and understood in the light of the facts of the case. Some isolated expressions give some countenance to the holding in the opinion, but when applied to the facts in regard to which they were used, they do not, in my judgment. The facts in reference to which the strongest expressions are used, in *Tenney* v. *Harvey*, 63 Vt. 520, do not appear. I did not sit in that case and have no knowledge of them. On the facts as left by the exceptions in this case, with no presumptions made for or against the excepting party, there was manifest error in admitting this testimony of Dr. Foote. I think the excepting party did all that he was required, when he made such error appear, by his draft of the exceptions, and that the opinion on this point is a departure from what has heretofore been considered the certainty with which error must be made to appear.

I also think it was error to allow the question put to this witness, as an expert, in rebuttal. It is well established that, in taking the opinion of an expert witness, the facts upon which his opinion is based, must go to the jury in connection with his opinion, that the jury my be able to judge of the weight which they ought to give to his opinion, dependent, sometimes, upon whether they find the facts, upon which the opinion is given, established. In *Fairchild* v. *Bascomb*, 35 Vt. 416, a well considered case on this subject, after stating the manner in which questions should be put, it is said: "Then the jury can know all the facts and grounds on which the opinion is based," and in *Wetherbee* v. *Wetherbee*, 38 Vt. 460, it is also said: "In any case the jury ought to know upon what basis of facts the opinion is founded, for its pertinence depends upon whether they find the

facts upon which it rests." It is usual to embody the facts, or supposed facts, upon which an opinion is desired, in the interrogatory, or to have the witness state the facts on which he founds his opinion. In *People* v. *Aikin*, 66 Mich. 460 (II St. R. 524) it is held, that "An expert can never be safely permitted to state that he has read or heard the testimony without stating the particulars of the evidence, the facts, upon which he rests his conclusions." Doubtless this is the safe rule of practice. This Court has departed from it, first in *Gilman* v. *Strafford* 50 Vt. 723, where the opinion of experts was taken upon facts stated in a deposition, and secondly, in *State* v. *Hayden*, 51 Vt. 296. The deposition would go to the jury. They could know the facts on, which the experts founded their opinion. In *State* v. *Hayden* the State gave no testimony on the subject of insanity, and was allowed to ask experts who had heard the testimony of the respondent on this subject, their opinion based upon all the facts which the respondent's witnesses had detailed. The facts were not voluminous, and were recently detailed to the jury. But in neither case did this Court attempt to vary the rule established in the earlier cases cited, that the jury must know the facts upon which the opinion is based. The contestants embodied the supposed facts on which they took Dr. Draper's opinion in an interrogatory. This interrogatory put to Dr. Draper was used a week or more before it was used to Dr. Foote by the proponents. It involved the consideration of a large number of supposed facts, covering nearly two pages of closely printed matter. It was not read to Dr. Foote nor to the jury. To allow an expert witness to answer such a question, under the circumstances, was an abrogation of the rule requiring the jury to have knowledge of the facts on which the opinion is required. This question not only was allowed to be answered without being read to the jury, but the witness was asked to supplement the facts embraced in the question put to Dr. Draper with the knowledge which the witness had of Mrs. Foster. He had known her from her birth.

She had lived in his father's family, ten or more years, after her mother died, when she was five years old; and had attended school for some time, at another place, where the witness was principal. Some three or four weeks before, he had testified quite fully to his knowledge of her. It is inconceivable that the witness had detailed all he had known of Mrs. Foster. The question as put against the exception of the contestants, and as repeated two or three times, and by the court, did not reqnire the witness to base his opinion upon the facts embraced in the question put to Dr. Draper, supplemented by the facts which the witness had detailed upon the stand, but allowed him to use any knowledge he had of Mrs. Foster, whether detailed upon the witness stand, and whether such knowledge came to him by personal observation, or by heresay. I think, the question was objectionable and erroneous for two reasons. If confined to the facts in the question and the facts detailed by the witness when first on the stand, after the lapse of time which had intervened since the question was used, and since the witness had testified, the jury could not have in mind the facts upon which the witness based his opinion. The opinion holds that it must be presumed that the jury could, and did, have all the facts on which the opinion was asked in mind. I do not know what sense there is, in a matter of practice, which can be avoided, in presuming what every man must know to be untrue. I have a fair memory, some of my brethren better memories. But none of us could, after the lapse of time which had intervened recall all the facts embraced in this question, and detailed by the witness when first on the stand. It is contended also that the County Court was misled by the first objection insisted upon by the contestants. I do not think this can be true. After the court had overruled this objection the question was modified, and again objected to. The court could not well understand that counsel was insisting upon an objection just overruled, to which he had saved an ex-

ception. The objection to the modified question, the court, without calling upon counsel to state what it was, overruled; thereby holding, that the objection, whatever it might be, was groundless. Again, the question as allowed, did not confine the witness to the facts which he had detailed when first on the stand. It was easy to have done so. It was highly important that the question should have been carefully framed, considering the witness's long acquaintance with Mrs. Foster, the impossibility of the witness having detailed when on the stand all he had known of her, the possibility, not to say probability, that the witness might, as he did, as admitted on cross-examination, include as knowledge what he had been told by friends, as well as what he had known personally, and also, that the witness was interested, being a brother to one of the principal legatees. When a party puts a question, improper in form, he cannot invoke the doctrine of *Frary* v. *Gusha*, 59 Vt. 257, that an improper or an inadmissible answer to a proper question is not reversable error. Against such an error a party cannot by any form of inquiry protect himself. When he puts his question, so as to invite an inadmissible answer and obtains it, the answer falls within the principle of *State* v. *Meader*, 54 Vt. 126, and the cases there cited. By the improper form of the inquiry he has elicited the inadmissible testimony. It is in the case, by his own fault. My brethren rely upon *Johnson* v. *Central Vt. R. R. Co.*, 56 Vt. 707 as holding the question proper in form. I do not understand the case as so holding. It only holds that under the circumstances of that case, entirely different from the circumstances of this case, the question in this form could not have misled the witness. The witness was not shown to have any knowledge of the plaintiff except what he gained on three occcasions when he examined him, and to which he had recently and fully testified. It was not shown that the witness was in fact misled. It is so shown in this case. Under the circumstances of that case it was properly held that

"The obvious and natural construction that would be put upon the language of the question would be, that he was required to give an opinion based upon what he had learned of his condition at the examinations that he had testified he made, and we have no doubt the doctor so understood it. "The language of an inquiry is always to be given meaning with referance to the circumstances in which it is used. The holding is not that the language of the inquiry is proper, but that there was nothing to show that it probably would, or did, mislead the witness in that case. Here it is shown affirmatively that Dr. Foote was misled, and considered, in giving his answer, what he had been told, as well as what he knew personally. When, as is held, an expert witness, on a grouping of facts, may be asked to give his opinion upon the identical question on which the jury are to pass, if, he, because skilled in regard to the subject, may give his opinion without the jury having clearly in mind, the facts, or group of facts on which it is based, the decision might as well be left with the witness, as it practically is. This class of testimony, at best, is uncertain and dangerous, and especially so when given by an interested witness. I think, under the circumstances of this case the allowance of this question was clearly reversible error.

15. I do not think, under the stipulation, Amelia French's testimony given in rebuttal before the Probate Court could be read. Except by the terms of the stipulation, that testimony was not admissible, so long as the witness was living. It did not stand like her deposition taken for cause, which cause was shown to exist when the deposition was offered. The stipulation was specific as to this witness. It gave the proponents the option to call the witness and use her, in person, or to treat her as sick and unable to attend, and read all her testimony given before the Probate Court. There is no provision in the stipulation which allows them to produce and use her, or any other witness, in part, and then supplement her testimony given in person with her testimony given before the Probate Court. They

elected to treat her as well. They called and used her as such. When they did so, they took the risk of her remaining able to be present and testify in rebuttal. Under the exercise of the option by the proponents, she stood like any other witness, able to attend Court. She was not absent from the State. The exercise of their option took her from the class "unable to attend Court by reason of sickness or accident." If the counsel had foreseen that a witness called and used, in part, might be unable to remain during the trial, they might have stipulated that the balance of the witness' testimony given before the Probate Court might be read. It might have been wise to have made such a provision. But no such provision or stipulation was made. It is not for the court to import such provisions into a stipulation, as necessities may require.

It is to construe the stipulation as made, and not to add to it by construction or otherwise. I find no provision in the stipulation, for the court to construe, on this subject. In my judgment this allowance by the court was error.

For these reasons, I should reverse the judgment. I concur in the decision of the other points.

GEORGE RANNEY, ADMR. *v.* St. J. & L. C. Rd. CO.

Joinder of Counts where damages accrue to plaintiff in different rights.

1. The mere fact that two causes of action do not accrue to a plaintiff in the same right, is no reason why they may not be joined in the same suit, for the court can instruct the jury to assess separate damages on the several counts.
2. So an administrator may join a count for damages done his intestate in life by the neglect of the defendant with a count for damages accruing to the window and next of kin by the death of the intestate also resulting from the negligence of the defendant.

Case for the negligence of the defendant. Heard upon demurrer to plaintiff's declaration at the December term, 1890, Caledonia county, Powers, J., presiding. Demurrer overruled. The defendant excepts.

The plaintiff brought suit as the administrator of Ruth Richards, and his declaration was in two counts. The first count alleged that the intestate was injured by the negligence of the defendant and in consequence thereof suffered much pain and was put to much expense for the space of twenty-four hours, at the expiration of which time she died of the wounds so inflicted. The second count alleged that the intestate was injured by the negligence of the defendant and in consequence of such injuries died, leaving next of kin for whose benefit the suit was brought. There was no allegation that the neglect counted upon in the two counts was the same.

The defendant assigned as cause of demurrer a misjoinder of counts.

S. C. Shurtleff, for the defendant.

The causes of action do not accrue to the plaintiff in the same right; hence there is a misjoinder. *Walker* v. *Sawyer*, 13 N. H. 191; *Willard* v. *Stevens*, 24 N. H. 276.

Ide & Quimby, and *W. P. Stafford*, for the plaintiff.

Both causes of action are in case and a joinder was proper. 1 Chitty Pl. 200.

An administrator may in the same suit recover in his own name and his representative right. *Haskell* v. *Bowen*, 44 Vt. 579; *Smith* v. *Salmon*, 91 Am. Dec, 711.

The opinion of the court was delivered by

TAFT, J. It is insisted that there is a misjoinder of counts. There is no practical reason why the counts may not be joined in one declaration. The causes of action in their own character are the same; are in respect of the same alleged negligent acts of the defendant; they admit of the same general plea, are supported by the same evidence save on the question of damages, require the same judgment, and must be enforced in the name of the same party, the personal representative of the deceased. It is said, Gould's Pl. c. 4. s. 93, that distinct causes of action, though of the same nature and between the same parties, cannot be joined unless they all accrue to the plaintiff in one and the same right. In this case the causes of action do not accrue to the plaintiff in one and the same right; under one count they accrue in the right of the intestate, under the other, in right of the wife and next of kin. But the principal reason of this common law rule was, that on the finding of entire damages, it would not appear from the record how much of the amount found was assessed as assets in right of the intestate and how much in right of the wife and next of kin; the two claims belonging in fact to different persons.

The defendant's counsel argues that "in the absence of statutory regulations or the agreement of the parties, the court cannot instruct the jury to divide the damages," but under our

practice the court can instruct the jury to assess the damages under each count separately.

Our statute, s. 996, R. L., enacts that "the jury in the trial of a civil cause may find a special verdict agreeably to the usages of law," and causes are frequently tried with special findings only, with no general verdict. The objection, "that the rule in regard to costs on the two counts being different in the event of the suits failing," is not tenable, as the rule is the same; the administrator can undoubtedly protect himself against costs in the event of the failure of the suit, by requiring indemnification from the beneficiaries, and in the event of a recovery, the statute, s. 2140, R. L., gives him the right to deduct the costs and expenses of prosecution from the damages before paying them over to the persons entitled thereto; and Mr. Gould says in the section cited, that the consideration as to costs seems not now to be regarded as decisive. The reason of the rule ceasing, the rule itself ceases.

Where several rights of recovery can be enforced as well by one action as by several, a joinder of them is advantageous, and favored by the policy of the law. It is unreasonable that the defendant should be harrassed with several suits, if one will answer all the purposes of justice; such a course is vexatious and oppressive.

Judgment affirmed and cause remanded.

W. H. PRESTON, ADMR. v. ST. J. &. L. C. Rd. CO.

Joinder of Counts. General allegation of negligence sufficient. Defective allegation in count may be rejected as surplusage.

1. A count for the defendant's neglect, whereby the intestate suffered damages in his lifetime, may be joined with a count for the defendant's neglect resulting in the death of the intestate and brought for the benefit of the next of kin under the statute.
2. The action being for negligence of the defendant in furnishing its servant with unsuitable cars, a general allegation that the cars were improperly loaded, is sufficient without specifying the particulars.
3. And if the count contains such general allegations in proper form, and also allegations specifying the particulars, which are defective, the latter not being repugnant to the former, the count is not thereby rendered bad, for the special allegations may be stricken out as surplusage.

This was an action on the case for the negligence of the defendant whereby the death of the plaintiff's intestate was occasioned. Heard at the December term, 1890, Caledonia county, Tyler, J., presiding, upon the defendant's demurrer to the plaintiff's declaration. The demurrer was overruled and the defendant excepted.

The first count in the declaration was as follows:

"In a plea of the case for that heretofore to wit, on the 19th day or October, 1889, and for a long time before, to wit, at Concord in Essex county, to wit, at St. Johnsbury aforesaid, the defendant was and had been the owner and operator of a certain railroad, engines and cars by it used and employed in transporting passengers and freight from Lunenburg in said Essex county to said St. Johnsbury, and that there on said 19th day of October said Charles C. Blood was and for a long time before had been in the employ of the defendant, hired by it as a brakeman to assist in the governing and managing one of its said trains as such brakeman and thereby in the transportation of

said passengers and freight, and that by virtue and in course of said employment of said Blood then and there said Blood was obliged to and did stand upon and walk over the tops of said cars while the same were in motion to perform his said duties, and by virtue of the said employment of said Blood by defendant it then and there became and was the duty of said defendant to furnish cars for said Blood to stand upon and walk over as aforesaid, that were well and safely constructed and of proper and safe material for his use as aforesaid with proper care on his part; yet the defendant, disregarding said duty, then and there carelessly and wrongfully furnished said Blood, to stand upon and walk over as aforesaid, a car which had not been before used by or known to said Blood and which was so insufficiently, carelessly and negligently constructed and of such unfit material that it greatly endangered the life of said Blood who was obliged then and there to use it as aforesaid; all which was then and there unknown to said Blood but well known to defendant.

And the plaintiff avers that then and there, while said Blood was in the careful and prudent use of said car on his part in standing upon and walking over the top thereof in the performance of his said duty as aforesaid, said car, by reason of said faulty and negligent construction and unfit material, gave way while in motion under the weight of said Blood and threw him with a great quantity of the lumber with which said car was loaded upon the ground in the midst of and underneath said lumber, whereby he was greatly bruised, maimed, cut, shaken and his bones broken and his whole system injured internally insomuch that he then and there became and was very sick and weak and so remained for a long space of time, to wit one month, during which time he suffered great pain and anguish and was prevented from carrying on his lawful and necessary affairs and was forced and obliged to expend and did expend a great sum of money, to wit, five hundred dollars in endeavoring to cure the injuries received as aforesaid, and thereafterwards, to wit, on the 19th day of November, 1889, at St. Johnsbury aforesaid, died of his said wounds and injuries. To the damage of the plaintiff five thousand dollars."

The second count was like the first, save that in the introduction it alleged that the defendant was operating a certain "other railroad", and in the conclusion, that the intestate left a wife and children for whose benefit under the statute the suit was brought.

The remaining six counts set forth the defendant's negligence in general terms, and in addition undertook to point out specifically the respects in which that negligence consisted.

The defendant demurred specially for that in the first and second counts the paticulars in which the alleged negligence consisted were not attempted to be pointed out at all, and in the remaining counts were only alleged argumentatively.

S. C. Shurtleff, for the defendant.

A party can have but one action for one injury, and in that must recover entire damages. *Bardwell* v. *Jamaica*, 15 Vt. 438; *Whitney* v. *Clarendon*, 18 Vt. 252; *Fulsome* v. *Concord*, 46 Vt. 135; *Insurance Co.* v. *Brame*, 95 U. S. 754; The Harrisburg, 119 U. S. 199; *State* v. *Maine Central Rd. Co.*, 60 Me. 490; see *Dibble* v. *New York and Erie Rd. Co.*, 25 Barb. 183; *Littlewood* v. *the Mayor, Aldermen, etc, of the city of New York*, 89 N. Y. 24; *McCarty* v. *Railroad Co.*, 18 Kan. 46; A. L. Reg. for Sept. 1889, 528.

There is a misjoinder of counts. The plaintiff does not sue in the same capacity. *Walker* v. *Sawyer*, 13 N. H. 191; *Willard* v. *Stevens*, 24 N. H. 276.

The declaration should point out the specific neglect with which the defendant is charged. Gould's Pl. p. 39 s. 2; *Wright* v. *Bourdon*, 50 Vt. 494; *Kennedy* v. *Morgan*, 57 Vt. 46; Chitty's Pl. p. 382.

W. P. Stafford and *Ide & Quimby*, for the plaintiff.

The general allegation of negligence is sufficient. *Lyman* v. *Central Vt. Rd.*, 59 Vt. 187; *Noyes* v. *Smith & Lee*, 28 Vt. 59; *Ware* v. *Gay*, 11 Pick 106; *Feital* v. *Middlesex Rd. Co.*, 109 Mass. 398.

If the defendant needs specifications to prepare its defence the court can order them. *Davis* v. *Guarnieri*, 4 Am. St. Rep. 555.

There may be two causes of action when death results.

Needham v. *G. T. Rd. Co.*, 38 Vt. 294; *Wescott* v. *Rd. Co.*, 61 Vt. 438; *Carey* v. *Berkshire Rd. Co.*, 48 Am. Dec. 638; *Louisville Rd. Co.* v. *Goodykoontz*, 12 Am. St. Rep. 377; *Daley* v. *Boston & Albany Rd. Co.*, 147 Mass. 101; *Barley* v. *Rd. Co.*, 4 Bissel 430.

An administrator may join causes of action accruing in his individual and representative capacity. *Haskell* v. *Bowen*, 44 Vt. 579; *Smith* v. *Solomon*, 91 Am. Dec. 711.

TAFT, J. delivered the opinion of the Court.

The question of a misjoinder of counts was ruled against the defendant in *Ranney, Admr.* v. *St. J. & L. C. R. Co.* heard at this term *ante*, p. 277.

It is claimed that the several counts are defective. The phraseology of the allegation of the breach of the defendant's duty differs in some respects in the different counts, but there is a substantial allegation in each one, either that the defendant furnished the plaintiff with cars insufficiently, carelessly and negligently constructed, and of unfit material, or, with cars unsafe or unfit for the plaintiff to use, or, with cars insufficiently and carelessly constructed and arranged, or, with loads insufficiently and improperly secured.

The defendant insists that the defects in the cars, and in what respect the cars were unsafe and unfit to use, and in what manner the cars were carelessly constructed and the loads improperly secured, should be specified and pointed out in the declaration, to enable it to prepare its evidence to meet the plaintiff's case. Upon that point, the character and material of the construction of the cars, and the manner in which they were loaded, is all that is brought in issue by the declaration, and all that the plaintiff can offer evidence upon, and all that the defendant is called upon to meet; we perceive no difficulty in the way of preparation by the defendant of its defence. It is fully informed of the claim that its negligence consisted in carelessly

constructing its cars of unsafe and unfit material, or furnishing such a car, and furnishing improperly loaded cars. The defendant is in possession, and ought to know of the construction, and material of which its cars are constructed. Its means of knowledge are much better than those of the plaintiff.

In actions on the case for negligence, the cause of action should be fully and specifically disclosed for the information of the defendant; but a general statement of the cause of action is all that is required, if the statement is sufficient to put the defendant on his defence, and fully and fairly informs him of the plaintiff's claim.

It is said that in stating the injury it is frequently sufficient to describe it generally, without setting out the particulars of the defendant's misconduct. Thus, in an action for persuading the plaintiff's wife to leave him, it is sufficient to state that the defendant unlawfully persuaded and enticed the wife to continue absent, etc, without setting forth the means of persuasion used by the defendant. So in actions for diverting water from a stream, or disturbing a right of common way, etc., it is sufficient to allege a diversion or disturbance generally, without showing the particular means employed. 1 Ch. Pl. 391. In an action for breach of warranty of soundness of a horse, it is sufficient to assign the breach in the negative terms of the warranty, without alleging wherein the unsoundness consisted. *Wheeler* v. *Wheelock*, 33 Vt. 144. In actions for damages caused by the insufficiency and want of repair of a highway, we think the practice in framing declarations has always been to allege the breach by negativing the words of the statute, without setting forth the particular defects in the highway, and it was said by Bennett J., in *Noyes* v. *Turnpike Co.*, 11 Vt. 531, that no reason was shown, nor perceived, why this latter allegation should be necessary.

In the respect indicated the counts are sufficient, and a good cause of action is set forth in each. In some of the counts it is alleged in what respect the cars were insufficient, and carelessly

loaded, etc., and these allegations are criticized by defendant's counsel as defective; but as the counts in their other allegations set forth a good cause of action irrespective of these claimed defective allegations, and the allegations in the counts are not repugnant, the counts are not bad. The allegations specifying the defects can be stricken out and still leave a good cause of action set forth. The specific defects being alleged, the plaintiff may be confined in the evidence to proof of what is alleged, but that does not render the counts demurrable. The counts are sufficient and well joined.

Judgment affirmed and cause remanded.

ALBERT L. STILLWELL *v.* JACOB FAREWELL.

Trover for coversion by exceeding limits of bailment. Evidence. Entry on book. Intoxication of defendant. Damages when property received back. Rebuttal. Modification of contract.

1. The action being trover for the conversion of a horse by driving it beyond the limit of the original bailment, an entry upon the plaintiff's book made at the time is not original evidence of the terms of the bailment, but at most is only corroborative as a memorandum to assist the plaintiff's memory, and should only be submitted to the jury with this restriction from the court.

2. The plaintiff claimed that the horse had been misused on the trip. The defendant insisted that he drove it properly, and sought to prove this by the testimony of himself and one Allen who rode with him. *Held*, that the plaintiff might properly show that the defendant was intoxicated, as tending to establish his misuse of the horse, and might show the same fact as to Allen after he was improved as a witness.

3. Allen having testified that he drank nothing that day but beer, the plaintiff might be permitted to ask him on cross-examination if two days after he did not offer alcohol to another person, saying it was some left from this occasion.

4. The plaintiff having received back the property converted, an instruction that the measure of damages would be the difference in value when converted and when returned is sufficiently favorable to the defendant.

5. The plaintiff having introduced evidence of the value of the horse when received by the defendant, as tending to show its value when converted, and the defendant having introduced no evidence of any change in its condition, the court properly instructed the jury that they were to consider whether its condition probably remained the same.

6. The plaintiff testified upon direct examination that the horse was worthless when returned. Upon cross-examination he said that he had subsequently traded him off. *Held*, that upon re-examination he might

further state what he received for the horse and what he had previously expended upon it.

7. The evidence of the defendant tended to show that the horse was permanently lame before he hired it. *Held*, that the plaintiff might show the contrary in rebuttal.

8. The defendant was not entitled to an instruction that he could not be made liable unless he drove the horse beyond the point to which he notified the plaintiff he was going upon leaving. The rights of the parties were determined by the contract of bailment, and one party could not modify that by mere notice.

Trover for the conversion of a horse. Plea, the general issue. Trial by jury at the June term, 1890, Orange county, Tyler, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The opinion states the case.

Geo. L. Stowe and *R. M. Harvey*, for the defendant.

The admission of the entry upon the plaintiff's book as independent evidence was error. *Godding, Admr.* v. *Orcutt*, 44 Vt. 54.

That the defendant was intoxicated had no bearing upon the case and was improperly admitted. 1 Add. Tor. (Wood's Ed.) s. 541; *Abbott* v. *Kimball et al.*, 19 Vt. 551; *Nutt* v. *Wheeler*, 30 Vt. 437; *Tinker* v. *Morrill et al.* 39 Vt. 477.

J. K. Darling and *C. N. Watson*, for the plaintiff.

In connection with the plaintiff's testimony his book was properly admitted. 1 Greenl. Ev. ss. 118–119 and notes; *Winship* v. *Waterman*, 56 Vt. 181.

That the defendant and Allen were intoxicated on arriving home tended to discredit them as witnesses. *Cox* v. *Eayres*, 55 Vt. 24, 35.

The rule adopted by the court as to damages when the property is returned is the correct one. 2 Greenl. Ev. 640 and cases cited; *Yale* v. *Saunders et al.*, 16 Vt. 243; *Greenfield Bank* v. *Leavitt*, 17 Pick. 1; *Lucas* v. *Trumbull*, 15 Gray 306; *Perham*

et al. v. *Comy*, 117 Mass. 102; *Gove* v. *Watson*, 61 N. H. 136; *Hurlbert* v. *Green*, 41 Vt. 490; *Baker* v. *Drake*, 53 N. Y. 211.

The opinion of the court was delivered by

MUNSON, J. The plaintiff, a livery stable keeper in Chelsea, claimed that he let the team in question to the defendant, to be driven to Barre, and that the defendant converted the property by taking it beyond the agreed destination. The defendant conceded that the team was originally engaged for a trip to Barre, and that he drove it to Montpelier; but he claimed that just before leaving the stable the contract was so modified as to permit this further use.

The plaintiff was permitted to produce in evidence, in connection with his testimony regarding the contract, the register in which he kept a record of teams let, which contained what purported to be an entry in due course of the transaction with defendant. The defendant insists that this entry was admissible only as confirmatory of the plaintiff's testimony, and that it was submitted to the jury as independent evidence of the terms of the contract.

Assuming that it sufficiently appears that the book was one of original entries, and assuming also that the entry contains nothing more than may properly be embraced in a book charge, the entry would have been independent evidence in an action to recover the price of the letting. But we think that in an action to recover damages for a conversion of the property the entry must stand as a mere memorandum, and be weighed only in connection with the plaintiff's testimony. In assumpsit for goods sold and delivered, entries properly made upon book are evidence of the sale and delivery of the things charged. *Burnham* v. *Adams*, 5 Vt. 313. But where goods have been sold to one who is claimed to have taken more than his purchase entitled him to, and it is sought to charge him in trespass or trover for the excess, we do not understand that such an entry can be used to limit the amount of the sale, and thereby establish a tortious taking of what is not covered by the entry.

So this entry was admissible only to corroborate the plaintiff's testimony, and not as affording direct evidence of the terms of the contract; and was to be submitted to the jury with this restriction as to its effect. *Lapham* v *Kelly*, 35 Vt. 195. The defendant claims that no such restriction was imposed, and upon the exceptions before us this view must be sustained. The court referred to the entry as "tending to show what the contract was," and as "bearing upon the question whether there was a meeting of the minds of the parties" in modification of the contract. These expressions, unaccompanied by any explanation of the doctrine applicable to memoranda, must have led the jury to give to this entry the force of direct and independent evidence.

The plaintiff claimed that the horse was misused on the return trip and was worthless when it reached the stable. The defendant claimed, and sought to establish by his own testimony and that of one Allen, who rode with him, that the horse was properly driven and sustained no injury. The testimony received to show that the defendant was intoxicated when returning and on his arrival was admissible as tending to support the plaintiff's claim that the horse was improperly driven and thereby injured. The defendant having subsequently taken the stand, this evidence became entitled to consideration as tending to show that he could not testify correctly to what occurred on the trip. But testimony of the same character as to Allen could not be received on the first ground, unless there was some evidence to connect him with the driving or care of the horse. Nor was it admissible on the second ground until after he had been a witness. The charge of the court upon this point contains no error prejudicial to the defendant.

Allen testified on direct examination that he took nothing but beer that day, and that a bottle of alcohol he had on reaching home was in the same condition as when he left Montpelier, and that the defendant drank nothing during the day to his knowl-

edge. In view of this testimony, it was proper to ask Allen in cross-examination if he did not, two days after, offer alcohol to another person, saying it was some left from this occasion. If the question did not call for anything directly inconsistent with what he had testified to, it was one well calculated to lead him to admit something beyond what he had thus far disclosed.

It is well settled that when property converted is afterwards returned to the owner and taken possession of by him, its return is to be considered in mitigation of damages. The case discloses no reason why a return in this instance should be held to restrict the plaintiff to nominal damages, as claimed by the defendant. The court held that the measure of damages was the difference between the value of the property at the time of conversion and its value when returned; and if either party was entitled to complain of this, it was not the defendant. 1 Add. Torts, Wood's Ed. 495 n; *Yale* v. *Saunders*, 16 Vt. 243.

The plaintiff relied upon a conversion at Barre. As bearing upon the value of the horse when at that point, he was properly permitted to show its value at and shortly before the time it was taken from the stable. As the defendant offered no evidence tending to show that the horse was worth less on its arrival at Barre than when it left Chelsea, and made no claim to that effect, he could ask nothing more than, nor different from, the court's instruction to the jury in this connection, that they inquire whether it was probable that the condition of the horse at Barre was different from its condition on starting.

The plaintiff testified in chief that the horse was worthless when returned. On cross-examination it appeared that he had afterwards traded it off. Upon re-examination he was permitted to state what he had realized from the horse, and what expense he had been put to. From the data thus obtained it was probably argued that his evidence in chief was correct. Without it, it would doubtless have been argued from the cross-examination that his evidence in chief was false. The answers received under

objection were admissible to support his direct evidence against the unfavorable presumption which might otherwise have been drawn from his cross-examination.

The defendant's evidence tended to show that the horse was permanently lame before he hired it. In rebuttal, the plaintiff was permitted to show by witnesses who had driven the horse before the defendant had it that it was not lame. The fact that the plaintiff had shown the condition of the horse upon the question of damages in making out his case, did not make this further testimony inadmissible. A plaintiff is not obliged to rely upon the general evidence of his opening case to overcome a specific point developed by the defence, but may give such point a direct and specific denial.

The defendant was not entitled to a charge that he would not be held liable unless it was found that he drove the horse beyond the place to which, at the time of leaving, he notified the plaintiff he intended to go. It was left to the jury to determine, under proper instructions, whether the original contract was subsequently modified as claimed by the defendant. It could not be modified by the action of one party alone; and it was for the jury to say, upon a consideration of all that was said and done, whether any proposition which the defendant might be found to have made was assented to by the plaintiff.

Judgment reversed and cause remanded.

SMITH HILLIARD, *v.* PHILIP DEAN AND LUCIA DEAN.

Title to lumber cut upon land occupied under bond for deed.

The defendants, being the owners in fee of certain lands, let W. into possession under an agreement to convey upon the payment of a certain sum. Before payment W. severed lumber from the premises with the knowledge of the defendants and sold it to the plaintiff. The defendants notified the plaintiff that they claimed the lumber before he paid for it. *Held*, that the lumber belonged to the defendants and that they might take possession of it.

Trespass for the taking and carrying away of certain lumber. Heard upon the report of a referee at the June term, 1889, Bennington county, Tyler, J., presiding. Judgment on the report for the plaintiff. The defendant excepts.

The opinion states the case.

Batchelder & Barber, for the defendants.

The title to the land was in the defendants and that carried with it the title to the lumber. *Dickerman* v. *Ray*, 55 Vt. 68; *Town of Lemington* v. *Stevens*, 48 Vt. 41; Bish. Con., s. 673 and cases there cited; *Blaisteel* v. *Stevens*, 16 Vt. 186; *Field, Morris & Co.* v. *Stearns*, 42 Vt. 111.

Martin & Archibald, for the plaintiff.

Wilkins being in possession under an arrangement by which he was allowed to cut and manufacture lumber, the defendants cannot assert title to this lumber by virtue of their title to the land. *Clafflin* v. *Boston & Lowell Rd. Co.*, 7 Allen, 314.

The opinion of the court was delivered by

START, J. In this case the plaintiff seeks to recover the value of a quantity of lumber purchased by him of one Fred B. Wilkins, and taken by the defendants from his possession. The

defendants claim title to the lumber by reason of their owning the land from which it was severed. The lumber was severed from land the legal title of which was in the defendants. The defendants had given Wilkins a bond conditioned that they would convey the land to him when he paid twelve hundred and fifty dollars and gave a mortgage back to secure the payment of the further sum of twelve hundred and fifty dollars. Payments were to be made by delivering to the defendants yearly thirty thousand feet of lumber. Wilkins went into possession of the land, and, with the knowledge of the defendants, and without objection, took therefrom lumber with which to make one payment, and sold some of the lumber to other parties. The plaintiff was notified before he paid Wilkins for the lumber that the defendant, Lucia Dean, claimed it, and that he must not draw it away.

Upon these facts, we hold that the defendants were the owners of the lumber in question. They had not parted with their title to the land from which the lumber was taken. They were obligated by their bond to convey to Wilkins when he should pay twelve hundred and fifty dollars. At the time the lumber in question was severed from the land, Wilkins had made but one payment of thirty thousand feet of lumber, valued at about three hundred dollars. The legal title to the land being in the defendants, they owned the trees standing and growing thereon; and the trees having been severed from the land and sawed into lumber, without license from them, they were the owners of the lumber, and could assert their right to it in the manner they did. *Dickerman* v. *Ray*, 55 Vt. 65; *Whitcher, Admr.*, v. *Morey*, 39 Vt. 459.

Judgment reversed and judgment for the defendants.

SMITH HILLIARD *v.* PHILIP DEAN AND MERRITT DEAN.

This was an action in trespass for the taking of a part of the same lumber involved in the preceding case of *Smith Hilliard* v. *Philip Dean and Lucia Dean*, and the facts in the two cases are identical. Heard below upon a referee's report at the June term, 1889, Bennington county, Tyler, J., presiding.

Judgment for the plaintiff. Exceptions by the defendants.

Batchelder & Barber, for the defendants.

Martin & Archibald, for the plaintiff.

The opinion of the court was delivered by

START, J. This case was argued with that of *Smith Hilliard* v. *Philip Dean* and *Lucia Dean*, involving the same questions; and, for reasons given in the opinion in that case, the judgment of the County Court should be reversed.

Judgment reversed and judgment for the defendants.

STATE *v.* N. W. CAMP.

Intoxicating Liquor. Giving away in barn unlawful. Sale. Error.

1. Under No. 41, Acts of 1882, it is unlawful to give away intoxicating liquor in one's barn or granary. The words "own private dwelling" apply merely to the building in which one lives, eats, sleeps and entertains his friends.

2. The evidence of the State tended to show that the witness went to respondent's house and called for cider; that the respondent invited him into his cellar, told him he had something better than cider, and furnished him with a drink of whiskey; that witness inquired what was to pay and respondent replied nothing, that he kept nothing for sale, whereupon witness threw down a quarter and went away. *Held*, that this evidence tended to show a sale.

3. It was not error to refuse to instruct the jury as to the common law definition of a dwelling, they being correctly told what the word meant in the statute.

Indictment for selling, furnishing and giving away intoxicating liquor. Plea, not guilty. Trial by jury at the September term, Washington county, 1890, Munson, J., presiding. Verdict, guilty of one offense. The respondent excepts. The facts appear in the opinion.

Wing & Fay, for the respondent.

The legislature is presumed to use words in their legal sense as fixed by previous decisions. Endl. Interp. St. ss. 3, 79, 127, 330, 357 and 367.

The word dwelling, so considered, includes outbuildings. Bouv. Law Dict., title Dwelling House; 2 Bish. Stat. Cr., ss. 278, 286 and 289; Bish. Cr. Proc. (3d Ed) s. 135.

E. W. Bisbee, for the State.

The opinion of the court was delivered by

START, J. The respondent claims that the furnishing of intoxicating liquor, under the circumstances and in the places disclosed by the State's evidence, is not prohibited by the statute relating to traffic in intoxicating liquor. The evidence tended to show that the respondent gave away intoxicating liquor in his barn and granary. If the barn and granary were not a part of the respondent's dwelling house, within the meaning of the statute, then the giving away of intoxicating liquor therein was unlawful.

Section 3800 of R. L., relating to the sale and giving away of intoxicating liquor, among other things, provides that the words, "give away," shall not apply to the giving away of intoxicating liquor, at "private dwellings or their dependencies," except under certain conditions which have no application to this case. By No. 41 of the Acts of 1882, this section is amended, and, as amended, provides that the words, "give away," shall not apply to the giving away of intoxicating liquor by a person in his own "private dwelling." By ommitting the words, "or their dependencies," in the act of 1882, it is clear that the Legislature intended to give the words, "give away," a more restricted meaning than that given by the original act. If the Legislature intented the words, "private dwellings," or the words, "his own private dwellings," to include barns and other out-buildings, then the words, "or their dependencies," as used in the original act, had no meaning, and the Legislature amended the act by omitting these words, without intending thereby to give any different meaning to the words, "give away," from that in the original act. We think the Legislature by the use of the words, "or their dependencies," in the original act, and the omission of these words in the latter act, has clearly indicated that it did not intend the words, "his own private dwelling," to include barns and other out-buildings, and the right to give away intoxicating liquor is restricted to the giving of it in the building in which

one lives, eats, sleeps, and entertains his friends; and we hold that the giving away of intoxicating liquor by the respondent, in the manner and in the places disclosed by the State's evidence, was unlawful.

The testimony of Laird and Emery tended to show a sale of intoxicating liquor. They went to the respondent's house and called for some cider. The respondent invited them into his cellar, and there told them he had something better, produced a bottle of whiskey and offered them some, and they both drank from the bottle; Emery also drank cider. Emery asked the respondent what the bill was, and he replied that it was nothing —that he kept nothing for sale. Thereupon, Emery threw a quarter of a dollar upon a barrel there standing, and left it. Under proper instructions, which were given, it was for the jury to say whether this was a sale, or a giving away, of intoxicating liquor, and the respondent's motion for a verdict was properly overruled.

The court properly refused to instruct the jury as to the common law definition of a "dwelling house." They were fully instructed as to what the Legislature intended by the words, "one's own private dwelling," as used in the statute, and this was all that was required.

In other respects, the charge was such as the case called for. It was not error to call the attention of the jury to the evil of giving away intoxicating liquor under the circumstances disclosed by the evidence, and that it was an evil that the law was designed to guard against.

Upon inspection of the record, the court are of the opinion that judgment ought to be rendered upon the verdict, and it is so rendered; sentence imposed and execution ordered.

RUTLAND COUNTY.

JANUARY TERM, 1892.

PRESENT: ROSS, Ch. J., ROWELL, TYLER AND MUNSON, J. J.

JANE POTTER *v.* ADMR. HENRY POTTER ET AL.

Husband and wife. Earnings by wife. Allowance in name of husband. Equity.

1. Whatever a wife earns by her own labor upon the understanding between herself and husband that it shall be hers will enure to her benefit.
2. The fact that such a claim is presented against the estate of a deceased person in the name of the husband does not make it his; it being understood that the wife shall have the benefit of the allowance.
3. And the wife may invoke the aid of a court of equity to restrain the administrator of her husband's estate from conveying away such allowance.
4. The mere fact that the Probate Court, in making the wife her allowance, treated the claim as a part of the husband's estate does not alter the case.

Bill in chancery. Heard at the September term, 1891, upon pleadings and a master's report. Thompson, Chancellor, decreed for the oratrix. The defendants appeal.

The father of the oratrix was afflicted with a cancer. Some years before his death he came to reside in the family of the oratrix upon the understanding between the oratrix and her husband that whatever was paid for his care and nursing should be

hers. After the death of her father an administrator and commissioners were appointed upon his estate. The husband had an account against the estate for other matters. To this was added an item of $180 for care and nursing, and the entire account was allowed in the husband's name. It was understood between the oratrix and her husband that she should have the benefit of this item.

Before the payment of this allowance the husband of the oratrix died and the defendant Walker was appointed administrator upon his estate.

Subsequently the oratrix applied to the Probate Court for an assignment out of her husband's estate which was made. The master found that in making this assignment the court treated the said $180 as a part of said estate.

Still later the defendant Walker made an arrangement with the defendant Ida M. Eddy, who was the only child and heir of the husband of the oratrix, to transfer to her the entire estate remaining after the allowance to the oratrix, upon condition that the said defendant should assume and pay the debts, and in pursuance of this agreement was about to transfer the claim in question to her. Thereupon the oratrix brought this suit to enjoin him from so doing and to compel payment to herself.

J. C. Baker, for the defendants.

The services of the oratrix belonged to her husband. *Goodale* v. *Frost*, 59 Vt. 491.

The agreement between the oratrix and her husband that she should have the benefit of the allowance in his name is not enforceable. *Beaver* v. *Beaver*, 117 N. Y. 421; *Appeal of Walsh*, 9 Am. St. Rep. 85; *Keniston* v. *Keniston*, 56 Vt. 680.

It was not a valid gift because there was no delivery and acceptance. *Fletcher* v. *Fletcher*, 55 Vt. 325; *Ross* v. *Draper*, 55 Vt. 404; *Rogers* v. *Rogers*, 55 Vt. 73; *Pope* v. *Bank*, 56 Vt. 284.

The oratrix should have presented the claim against her father's estate in her own name. *Story* v. *Downey*, 62 Vt. 243.

Having allowed the Probate Court to believe that this claim was her husband's and obtained her allowance upon that theory she is now estopped to deny it. *Cady* v. *Owens*, 34 Vt. 598; *Shaw* v. *Beebe*, 35 Vt. 208.

Bromley & Clark and *Geo. E. Lawrence*, for the oratrix.

The opinion of the court was delivered by

ROSS, Ch. J. The indebtedness which the oratrix seeks to hold, accrued to her, with her husband's consent and agreement. She was the meritorious cause of the indebtedness. *Baird and wife* v. *Fletcher*, 50 Vt. 603. The master has found that the husband gave the oratrix the right to have the debt, which should accrue from keeping her father and that it accrued to her. This the husband could legally do, if it amounted to a gift, unless it trenched upon the rights of creditors. *Barron* v. *Barron*, 24 Vt. 375; *Cardell* v. *Ryder*, 35 Vt. 47. It did not affect the rights of the husband's creditors. When the husband allows the wife to earn property during coverture, or makes a gift to her, the right to reduce such property to possession does not inhere in the husband. *Bent* v. *Bent*, 44 Vt. 555. On the facts found the claim for $180 against her father's estate accrued to and belonged to the oratrix. The presentation and allowance of it in the husband's name under the agreement of the husband that it should still belong to her, did not make the allowance of the $180 belong to him. It placed it in his name to collect and pay over to her. The doctrine relative to gifts *inter vivos* has no application. The husband never had any property in the claim to give to the oratrix. It accrued to her, and the beneficial interest always remained in her. It was allowed in his name, but as between them, in trust for her. The administrator of the husband having undertaken to convey it away, the oratrix had the right to invoke the aid of the court of equity, to

prevent its coming into the possession of the administrator or his assignee. The husband, by consenting to the allowance in his name for the benefit of oratrix, did not become indebted to her. Neither he nor his estate would become indebted to her for the amount which might be realized from this claim of the $180, allowed in his name against his father's estate, for her benefit, unless he, or his estate, received and appropriated it to the use of the estate. This has never been done. Hence she had no claim growing out of this transaction to present against her husband's estate, and it was properly disallowed, because it did not exist. But such disallowance did not affect her right to have the trust, undertaken when the husband consented to have this claim allowed in his name for her benefit, performed. When whatever should be realized from it came to him or his estate, so long as he, or it held it for her, no indebtedness would be created in her favor.

But when the administrator undertook to divert it from coming to her, she had the right to invoke the aid of the court of equity to prevent such diversion, and to have the money coming from her father's estate on this claim paid directly to her.

Nor does the allowance out of her husband's estate made on her application to her by the Probate Court, affect her right to the money coming from her father's estate on this claim. Before making the application, the attorney of the oratrix had notified the administrator of her husband's estate, that she claimed, as her own, whatever should be realized on this claim. It does not appear that she knew that the Probate Court, in making the allowance to her, treated this claim as due to her husband's estate. The findings of the master on this subject fall short of finding that she was called upon to make known her claim and remained silent, and so misled the Probate Court in making the allowance to the detriment of the estate. The facts found do not constitue an estoppel upon her to enforce this claim.

Decree affirmed and remanded.

FRANCIS C. NOYES *v.* EDWIN H. HUBBARD.

Alimony. Discharge in Insolvency.

A discharge in insolvency does not bar a proceeding to enforce a decree for alimony made before the filing of the petition.

Petition to the County Court praying that the petitionee be adjudged in contempt for neglect to pay certain alimony decreed by said court. The petitionee pleaded in bar a discharge from the court of insolvency for the district of Rutland. To this plea the petitioner demurred. Heard upon demurrer at the September term, 1891, Thompson, J., presiding. Judgment that the plea was sufficient. The petitioner excepts.

J. C. Baker, for the petitioner.

A decree for alimony may be enforced by a proceeding for contempt. *Curtis* v. *Gordon*, 62 Vt. 340; *Andrew* v. *Andrew*, 62 Vt. 495; *Ex parte Spencer*, 83 Cal. 460.

Such a decree is not a debt provable against an insolvent estate, nor will it be discharged in insolvency. *Sheafe* v. *Sheafe*, 36 N. H. 155; *Ex parte Perkins*, 18 Cal. 60; *Pain* v. *Pain*, 80 N. C. 322; *Wightman* v. *Wightman*, 45 Ill. 167.

C. M. Willard, for the petitionee.

The decree was in the nature of a judgment and was barred by the discharge. *Harrington* v. *McNaughton*, 20 Vt. 293; *Downer* v. *Rowell*, 26 Vt. 397.

The opinion of the court was delivered by

ROSS, Ch. J. This is a petition to the County Court, praying that the petitionee be dealt with for contempt for neglecting to perform the decree of that court, made in a divorce

proceeding between them, ordering him to pay the petitioner one dollar a week for the support of their minor child, until the child shall attain the age of eighteen years.

The petitionee pleads in bar to the petition, a discharge granted him since the making of the order, by the court of insolvency.

The facts of the plea are admitted by the demurer. The contention is, whether the discharge in insolvency relieved the petitionee from the payment of the money ordered by the decree of alimony. By R. L. s. 1856 the discharge in insolvency discharged the petitionee "from debts proved against his estate; and from debts provable founded on a contract made by him while an inhabitant of the State, if made within the State, or to be performed within the same or due to a person resident therein, at the time of filing of the petition." The claim for this alimony was not proved against the estate of the petitioner in insolvency.

The petitionee contends, that the claim sought to be enforced is a debt provable, because he contends that the decree granting the alimony is a judgment, and a judgment for the payment of money is a debt founded on a contract. If it be of that character, it could not be enforced by proceedings for contempt, since the passage of the Act in 1839 abolishing imprisonment for debt founded on a contract. *Sawyer et al.* v. *Vilas*, 19 Vt. 43.

While ordinary judgments for the payment of money are held to evidence debts founded on contract, express or implied, which were discharged by a discharge in bankruptcy under the law of 1841, (*Harrington* v. *McNaughton*, 20 Vt. 293; *Downer* v. *Rowell*, 26 Vt. 397), all orders, decrees and judgments for the payment of money are not of that nature. *Clark* v. *Trombly et al.* cited, 19 Vt. 48. *In re Merrill Bingham*, 32 Vt. 329; *Leach* v. *Leach*, 51 Vt. 440; *Leach* v. *Peabody*, 58 Vt. 485.

A decree of alimony to be performed by the payment of

money is not evidence of a debt founded on a contract, express or implied, and may be enforced by imprisonment for contempt. *Andrew* v. *Andrew*, 62 Vt. 495. It is there held that such a decree is not a judgment for the enforcement of any contract, express or implied, existing between the parties thereto, but for the enforcement of a duty in the performance of which the public as well as the parties are interested. Such a judgment therefore is not a judgment founded on a contract, and is not discharged by a discharge in insolvency.

Judgment reversed, demurrer sustained, plea in bar adjudged insufficient, and cause remanded.

JOHN B. BEEMAN *v.* MARY A. COOPER ET AL.

Mortgage. Priority. Record. Life Support.

1. A mortgage subsequent in execution acquires priority by being first recorded, unless there exist some facts or elements which give to the mortgage first in execution a controlling equity.
2. The fact that the mortgage prior in execution was given for a debt already secured by an attachment upon the same premises would not be such an element.
3. A mortgage given to secure the future life support of the mortgagor will not therefore lose its priority over one given to secure a present debt, unless it affirmatively appears that the mortgagor did not reserve sufficient property for the payment of his then indebtedness.
4. And even if this did appear, the mortgage given to secure the present indebtedness would loose its right to priority if the mortgagee stood by until the consideration for the mortgage for life support had been fully executed.

Petition of foreclosure. Heard upon the report of a special master at the September term, 1891. Thompson, Chancellor, *pro forma*, dismissed the bill. The orator appeals.

Both the mortgage of the orator and that of the defendants were executed Sept. 29, 1874. That of the orator was to secure a note for $100 given in settlement of a suit then pending, in which these same premises had been attached, and was executed before that of the defendants, which was to secure the future life support of the mortgagor and his wife. The defendants' mortgage was filed for record at one o'clock on the day following its execution and that of the orator at 2.30 o'clock of the same day. The defendants had no knowledge of the orator's mortgage when they filed theirs for record, and the orator had no knowledge of the mortgage of the defendants until he lodged his in the town clerk's office.

John B. Beeman *v.* Mary A. Cooper *et al.*

The petition in this suit was returnable to the March term, 1891. The defendants had before then fully performed the conditions of their deed by supporting during their lives the mortgagor and his wife. The master found that the value of the support so furnished was more than that of the premises.

F. S. Platt, for the orator.

The mortgage to the defendants, being for future support, was void as to that of the orator which was for a present indebtedness. *Jones* v. *Spear*, 21 Vt. 426; *Cram* v. *Stickels*, 15 Vt. 252; *Church* v. *Chapin*, 35 Vt. 223; *Prout* v. *Vaughn*, 52 Vt. 451.

Geo. M. Fuller, for the defendants.

The defendants' mortgage acquired priority by being first recorded. *Johnson* v. *Burden*, 40 Vt. 567; *Sawyer* v. *Adams*, 8 Vt. 175-6.

The orator having stood by and suffered the defendants to expend money on the strength of their mortgage is now estopped to deny its validity. Sto. Eq. Jur., s. 384; Big. Est., (2d ed.) 453; *Note to Niven* v. *Belknap*, 2 Johns. 573; *McLane, Admr.* v. *Johnson*, 43 Vt. 54; *Hendricks, Admr.* v. *Dillon et al.*, 62 Vt. 430.

The opinion of the court was delivered by

ROSS, Ch. J. The mortgage given to Dr. Dewey, now owned by the orator, and sought to be foreclosed, and the mortgage to the defendant, Mary A Cooper, cover the same premises, and were executed the same day and on the same occasion, but that to the orator was first executed. Mary A Cooper had no knowledge of the execution of the mortgage held by the orator, and, without being put upon inquiry in regard to the same, placed her mortgage first upon record. This gave her mortgage the precedence, unless there existed some other facts or elements, which gave to the orator's mortgage a controlling equity. Some claim has been made, in this behalf, because the mortgage held

by the orator was given to relieve the premises from an attachment, placed upon them by Dr. Dewey, in a suit brought to recover the debt secured by this mortgage. But if Mrs. Cooper is affected with constructive notice of the attachment, by its record, the notice thus given did not extend beyond what was contained in the record. That contained nothing that would give her notice of the mortgage given subsequently to secure that debt. The lien upon the premises created by the attachment ceased, when the suit in which it was made, was dropped upon giving the mortgage. The mortgage is unavailing to keep it in existence, as there is no legal connection between the attachment and the mortgage. Mrs. Cooper had no actual nor constructive notice of the mortgage, held by the orator, when she placed the mortgage given her upon record. Hence, thus far, Mrs. Cooper can maintain her mortgage against the mortgage held by the orator upon the equitable maxim, "First in time, first in right."

But it is contended that the mortgage held by the orator has the greater equity because it was given to secure the payment of a present debt, while that given to Mrs. Cooper was to secure the life support and maintenance of the mortgagor and his wife. This equity rests upon the principle, that it is the duty of a debtor to pay his debts from his property, rather than to appropriate it for his own advantage by way of future life support. When a person takes the property of a debtor agreeing to furnish him life support therefor, if he has existing debts and not other property with which to pay them, although there be no actual fraud, the law holds such person guilty of constructive fraud, and will allow the debtor to satisfy his debt out of the property taken, against the rights of such taker. But no such fraud arises unless it appears affirmatively that the debtor did not retain other property sufficient to pay his then existing debts. The case is silent whether the mortgagor, did or did not, have property sufficient to pay his debts, other than that covered by the mortgages. The court will not presume the want of other property to enable it to raise a constructive fraud.

On the facts found by the master, the mortgage held by the orator is not entitled to priority over that given Mrs. Cooper. But if sufficient facts had been found to raise a constructive fraud in favor of the mortgage held by the orator, over the mortgage given Mrs. Cooper, and so have given to the former the greater equity, or the right to be first satisfied out of the mortgaged premises,—that equity, or right, would arise from the fact that the *consideration* for the mortgage held by the orator was *executed*, while that for the mortgage to Mrs. Cooper was wholly *executory*. When the orator stood by, until the consideration of the latter had become wholly executed, as it now has, the indebtedness, secured by the mortgage held by him, lost its superior equity, as was held by this court in *Kelsey* v. *Kelley and wife*, 63 Vt. 41.

Decree affirmed and cause remanded.

EDWARD T. GREEN *v.* ALONZO A. KELLEY.

Chattel mortgage. Oath. Demand by attaching officer for statement of amount due. Waiver of such statement by attorney. Sale of entire property when nothing but interest due.

1. A., being surety for B. upon a promissory note, promised to pay the note according to its tenor, and in consideration thereof B. promised to pay A. the amount of the note and secure the performance thereof by chattel mortgage. *Held*, that the oath in the mortgage properly described the debt from B. to A. as an absolute one.
2. Under R. L. 1181, which provides that an officer, having under attachment property encumbered by chattel mortgage, may demand of the mortgagee a written statement under oath of the amount due, which the mortgagee shall render within fifteen days; a demand for such a statement *forthwith* is not within the statute, and the mortgage lien will not be discharged by failure to render the statement within fifteen days from such a demand.
3. The attorney for the attaching creditor may waive the rendering of such an account or extend the time within which it shall be rendered, after a proper demand made.
4. *Held*, that the evidence in this case tended to show such a waiver or extension.
5. A sale upon chattel mortgage of the entire property, although but one year's interest upon the debt was then due, would not discharge the proceeds from the mortgage lien, even if such sale were authorized; certainly not if the mortgagor were present, participated in and consented to the sale.

Assumpsit. Plea, the general issue. Trial by jury at the March term, 1891, Start, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff sought to recover of the defendant certain moneys in his hands, the avails of personal property sold by him.

Edward T. Green *v.* Alonzo A. Kelley.

This property had been attached by the defendant at the suit of one Holden Kelley as the property of Harris Green, a brother of the plaintiff. Previous to the attachment, Harris Green had given the plaintiff a chattel mortgage on this same property, and the evidence of the plaintiff tended to show that after the attachment this mortgage was put into the hands of the defendant, who had made the attachment, and that the property was advertised and sold upon the mortgage. The facts appear in the opinion.

At the conclusion of the plaintiff's testimony the defendant moved the court for a verdict in his behalf. This motion was overruled and the defendant excepted. The exception of the defendant was, that the plaintiff's evidence would not entitle him to a verdict, first, because there was no consideration for the promise sought to be secured by the chattel mortgage; second, that the plaintiff did not render a sworn statement of the amount due on his mortgage within fifteen days from the date of the demand for such a statement by the defendant, and that neither the defendant nor the attorney for the attaching creditor had any authority from such attaching creditor to dispense with such statement; third, that since the mortgage debt was not due, the sale of the property must be construed to have been upon the attachment and not upon the chattel mortgage.

Geo. E. Lawrence, and *Fayette Potter*, for the defendant.

The oath in the mortgage was not sufficient, the debt from the mortgagor to the mortgagee not being due absolutely. *Tarbell* v. *Jones*, 56 Vt. 312.

H. A. Harman, and *J. C. Baker*, for the plaintiff.

The promise of Harris Green to pay the plaintiff the amount of the note upon consideration that the plaintiff should pay the note to Holden Kelley, created an absolute indebtedness from Harris Green to the plaintiff, which was correctly described in the oath to the mortgage. *Harrington* v. *Wright*, 48 Vt. 427.

Edward T. Green *v.* Alonzo A. Kelley.

Whether Harris Green might have objected to a sale of the mortgaged property when nothing but a year's interest was due, he did not object, but was present and assisted at the sale. Hence this objection cannot be urged by the defendant. *Downer* v. *Flint*, 28 Vt. 527; *Cady* v. *Owen*, 34 Vt. 598.

The defendant having acted as the agent of the defendant in making the sale and receiving the proceeds, cannot now defend on the ground that his conduct was illegal. *Baldwin* v. *Potter*, 46 Vt. 402; *Thayer* v. *Partridge*, 47 Vt. 423, (429).

The opinion of the court was delivered by

ROWELL, J. The testimony tended to show that plaintiff was surety for his brother on a note to Holden Kelley, defendant's father, for about $600, and that, being such surety, it was agreed between him and his brother that he should assume and pay that note and that in consideration thereof his brother should pay him $600, and secure its payment by the mortgage in question, which was subsequently given. By that agreement, as between them, the plaintiff became the principal on that note and his brother became his surety. *Wells* v. *Tucker*, 57 Vt. 223; *Field* v. *Hamilton*, 45 Vt. 35; *Comstock* v. *Drohan*, 71 N. Y. 9. It constituted, therefore, an adequate consideration for his brother's promise to pay him $600, and that indebtedness was properly specified as absolute in the condition of the mortgage, and hence the mortgage was good.

Holden Kelley, having attached the mortgaged property on another debt against the plaintiff's brother, the defendant, who was the attaching officer, demanded of the plaintiff an account forthwith of the amount of the debt secured by his mortgage, which the plaintiff did not render forthwith nor within fifteen days after the demand; and it is claimed that by reason of such failure the property was discharged from the mortgage. The statute provides that if the mortgagee resides in this State, as the plaintiff did, he shall render such account within fifteen days after

demand, and that in default thereof the property may be held and sold by the attaching creditor discharged from the mortgage. R. L. 1181. An attachment being a proceeding *in invitum*, and the consequences of non-compliance with the officer's demand may be so serious to the mortgagee (if the statute is to have effect), the demand, in order to be good, ought to be in substance and effect such as the statute authorizes. A demand for an account forthwith is not the same in substance and effect as a demand for an account within fifteen days, nor as a demand without naming a time for compliance, but leaving the mortgagee to comply within the statutory period, of which he must take notice at his peril. Therefore the plaintiff was not bound to comply with the demand made, and his non-compliance worked him no legal harm. But if this were otherwise, what transpired at the office of Mr. Potter, the attaching creditor's attorney, on April 9, 1890, two days after the demand was made, when the plaintiff, at the suggestion of Potter, put his mortgage into the defendant's hands to be foreclosed, in connection with the way the business of such foreclosure went on afterwards to the knowledge of Potter, tended to show that Potter either waived the officer's demand altogether, or at least consented to an extension of the time for complying therewith, and to show that the account that was rendered on May 3d was within the extended time. That Potter, as such attorney, had authority to do this, is shown by *Willard* v. *Goodrich*, 31 Vt. 597.

Defendant's condition is not bettered by the fact that all the property covered by the mortgage was sold when only one year's interest was due. That, if unauthorized, did not release the property from the lien of the mortgage so as to enable the attaching creditor to hold it discharged from the mortgage. *Stackpole* v. *Robbins*, 48 N. Y. 665. But the testimony tended to show that it was not unauthorized, for it appeared that the mortgagor was present at the sale and participated in it, which tended to show that he consented to it; and if he did, he is bound by it, and the lien of the mortgage would attach to the money in the defendant's hands.

Judgment affirmed.

Re EMMA C. BUCKMAN'S WILL, GILBERT D. BUCKMAN, APT.

A legatee is a competent witness as to the will. Husband as witness after death of wife. Privileged conversations. Evidence.

1. A legatee under a will is not thereby rendered incompetent as a witness to the capacity of the testator.
2. A husband after the death of his wife may testify for or against her estate as to all matters not confidential and not affecting her character.
3. Conversations between them in the presence of witnesses in respect to their respective interests in certain real estate the title to which stood in the wife are not confidential.
4. The question being upon the probate of a will, evidence that the testatrix had devised property not her own is admissible as tending to show want of testamentary capacity and undue influence.
5. Evidence of an agreement as to the ownership of property devised only puts that agreement in issue collaterally, and one party may testify in his own favor although the other is dead.

Appeal from a decree of the Probate Court for the district of Rutland admitting to probate the will of Emma C. Buckman. Trial by jury at the March term, 1891, Start, J., presiding. Verdict and judgment for the appellant. Exceptions by the proponent.

The appellant was the husband of the testatrix. Upon trial he offered himself as a witness, and was received against the exception of the appellee, to all matters not confidential and not affecting the character of his wife. Among other things he testified to a conversation in the presence of third persons in which she admitted and agreed that certain real estate of which the title

stood in her was their joint property. This real estate was devised to persons other than her husband by the will in question.

Howe & Cooledge, and *Geo. E. Lawrence*, for the proponent, cited, *Merrill, Admr.* v. *Pinney*, 43 Vt. 605; *Hall* v. *Hamblett*, 51 Vt. 589; *Marks* v. *Spencer*, 81 Va. 751.

J. C. Baker, and *Butler & Maloney*, for the appellant.

The husband might testify after the death of his wife to matters not confidential. *Edgell* v. *Bennett*, 7 Vt. 534; *Smith* v. *Potter*, 27 Vt 304; *Carpenter* v. *Moore*, 43 Vt. 392; *Stow* v. *Bishop*, 58 Vt. 498.

The matters testified to by him were not of this character. *Parkhurst* v. *Berdell*, 110 N. Y. 386.

Evidence tending to show that the testatrix had willed to others property belonging to her husband was competent upon the question of testamentary capacity. *Converse* v. *Converse*, 21 Vt. 168; *Thornton* v. *Thornton*, 39 Vt. 122; *Irish* v. *Newell*, 14 Am. Rep. 79; *Shailer* v. *Bumsted*, 99 Mass. 112; *Woodward* v. *Sullivan*, 152 Mass. 470; *Reynold* v. *Adams*, 33 Am. Rep. 15; *Shaver* v. *McCarthy*, 5 At. Rep. 614; *McCoon* v. *Allen*, 17 At. Rep. 820; *Meeker* v. *Meeker*, 7 Am. St. Rep. 489.

The opinion of the court was delivered by

ROWELL, J. The fact that the contestant is a legatee under the will does not render him incompetent as a witness. The ground and reason for this holding will be found fully set forth in the Foster will case, *ante* 233 and therefore they will not be stated here.

The court properly limited the contestant's testimony to non-confidential matters and to matters not affecting his wife's character. That is the rule early adopted in this State, and uniformly adhered to in practice. *Smith* v. *Potter*, 27 Vt. 304. And it makes no difference that had his wife been living the contestant could not have been a witness against her; for then he would have been incompetent on the ground of public policy; but

now, the marital relation having been dissolved by the death of his wife, that policy no longer renders him incompetent, only to the extent indicated by the rule stated. *Edgell* v. *Bennett*, 7 Vt. 534.

Nor did the contestant transcend the limit prescribed, by testifying to an agreement or understanding between him and his wife relative to their respective interests in the real estate devised by her will. That was not a matter in which she treated with him in marital confidence when they were alone, but was purely a business transaction, had and done between them in the presence of witnesses, evidently called as such, which precludes the idea of marital confidence.

It is not claimed that the other matters to which he testified were violations of such confidence.

The testimony was relevant to the issue of want of testamentary capacity and to the issue of undue influence; for if the testatrix undertook to devise property not her own, it tended to show mental weakness, as not knowing what property she had nor understanding the true relation she sustained to her husband in respect to their property rights. In *Bellows* v. *Sowles*, 59 Vt. 63, it was held that evidence that the testator undertook to devise property not his own, tended to show undue influence.

The agreement or understanding to which the contestant testified was only collaterally in issue, so the death of his wife did not render him incompetent by statute to testify to it. *Morse* v. *Low*, 44 Vt. 561.

Judgment affirmed and to be certified.

BRIDGET MAUGHAN *v.* ESTATE OF MICHAEL BURNS.

Appeal from Probate Court. County Court may raise ad damnum. Witness may give opinion of value. Competency for trial court. Harmless error. Insane ward may contract for support.

1. The plaintiff in an action upon a *quantum merit*, may recover a sum larger than the *ad damnum* in his declaration. The *ad damnum* is merely the plaintiff's estimate of what he is entitled to, and is not conclusive upon him.

2. The County Court has appellate jurisdiction of matters within the original jurisdiction of the Probate Court, and in the consideration of those matters is not confined to the questions actually considered in the Probate Court.

3. The County Court may permit the plaintiff, upon trial of an appeal from the allowance of commissioners, to raise the *ad damnum* of the declaration filed in the Probate Court, where the claim presented to the commissioners and that tried in the County Court are identical.

4. A witness may give an opinion as to the rental value of a house, or what it is worth to board a certain person, provided he has a suffcient knowledge of the premises to render him competent.

5. Whether the witness has such knowledge is for the determination of the trial court, and the determination of that tribunal will be conclusive unless it appears that there was error in law in making it.

6. A judgment will not be reversed for the introduction of evidence which could not have harmed the excepting party.

7. *Held*, that the charge fairly gave the jury to understand that the guardian of an insane person might provide for the support of his ward in the ward's own home, as well as elsewhere, if he desired.

8. *Held*, that the case showed such a state of facts as enabled the ward to contract for his own support.

This was an appeal from an order of the Probate Court for the district of Fair Haven, accepting the report of commission-

ers by which the plaintiff's claim was disallowed. Trial by jury at the September term, 1891, Thompson, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff sought to recover for services and expenditures in caring for the intestate. Her evidence tended to show that the intestate, Burns, was, during the latter portion of his life, a feeble and sick old man, who required unusual care and attention; that in 1879 she went to live in his house, and remained there until his death, July 14, 1889; that she went there under an arrangement to furnish and prepare his food, do his washing, and take such care of him as might be necessary, so long as her services were satisfactory, and that her services continued to be satisfactory to Mr. Burns down to the time of his death. While there, she occupied a portion of the intestate's house, and had the use of a portion of his garden, and her claim was for the value of her disbursements and services, less a fair rental for that portion of the house and garden which she occupied.

Upon the trial she introduced certain witnesses who had resided in Fair Haven, where the house of the intestate was situated, during the time that she lived there, were acquainted with the value of tenements in that vicinity, and who had had experience in boarding and caring for sick people; who knew the tenement in question, and had been familiar with the condition of the intestate during the time the plaintiff had lived with him; and proposed to show by them what the fair rental value of that portion of the tenement which she occupied was, and what it was reasonably worth to render for the intestate the services which she had rendered. The defendant objected to the admission of this evidence, and the same was admitted under his exception.

The defendant offered evidence tending to show that on February 7, 1888, the Probate Court for the district of Fair Haven appointed a guardian over the intestate. This guardian was introduced as a witness by the defendant, and testified in

substance, that soon after his appointment he visited his ward where he was living with the plaintiff, and there notified the plaintiff that she must vacate the premises; that he repeated this notice a short time afterwards in writing; that when at the house he inquired of the plaintiff and of the intestate, whether anything was wanted, and informed them that he would furnish whatever might be necessary, but that in point of fact he never did furnish anything, and never did make any arrangement for the support of his ward, either at his own house or elsewhere.

The defendant claimed that the plaintiff could recover nothing for services rendered after the appointment of this guardian, and certainly not after he had informed the plaintiff that she must vacate the premises, and that he would furnish whatever Mr. Burns needed, and requested the court to so hold. This the court declined to do, and instructed the jury upon this point as follows:

"February 7, 1888, a guardian was appointed unto Michael Burns. It does not appear in evidence for what cause. The guardian took possession of Burns' entire estate, with the exception of the rooms occupied by himself and the plaintiff. It became the duty of the guardian to properly care for and furnish Mr. Burns in a reasonable way, home, food, raiment and proper care, so far as his estate furnished the guardian with means to provide them, whether the guardianship came about by reason of mental unsoundness of Burns or from some other cause. If the guardian neglected to furnish Burns, he would have a right to procure it of the plaintiff, or any one else; that is, procure what was necessary according to his mental and physical condition, reasonably necessary, and could bind himself so that his estate would be bound for such necessaries. Now it does not appear that this guardian furnished anything in the way of support to Burns after the guardian was appointed. He says that he went there and inquired whether they wanted anything, and in substance that he learned that they did not; that they were getting along well enough, and that he did nothing. Now we instruct you, as a matter of law, that we do not think that is such a caring for and

providing for an old man, in the condition that the evidence tends to show this old man was, as amounts to a legal performance of the duty resting upon the guardian to furnish him with food and with care that would preclude the old gentleman from obtaining food and care such as were reasonably necessary to him, and his means, if the guardian knew the condition of this old man; if he did not, it was necessary to find out his necessities for food and care and attendance; and it was his duty not only to offer to furnish, but to furnish; and he had the right, if he was content to stand back and not furnish anything, to allow the old gentleman, by reason of his failure to provide for him, to furnish himself with necessaries. He had a right to take him away from there and provide him with a home and all these other things that were necessary, that the plaintiff provided, and take the control of the matter into his own hands. This he did not do."

To the charge of the court as above given, the defendant excepted. The other exceptions sufficiently appear in the opinion.

W. H. Preston & J. C. Baker, for the defendant.

The jury should have been restricted to the amount of the claim presented to the commissioners and interest; and the County Court had no power to raise the *ad damnum* in excess of this sum. *Harris et al.* v *Belden et al.*, 48 Vt. 478.

Evidence of what a fair rental of the house was or what it was worth to board the intestate was inadmissible. These were matters of common knowledge about which the jury were to form their opinion from the evidence. 1 Greenl. Ev. 574, n.; *Robertson* v. *Stark*, 15 N. H. 109; *Rochester* v. *Chester*, 3 N. H. 349.

The necessaries must have been furnished the ward in good faith or the plaintiff cannot recover. In this case the guardian offered to furnish what was needed. 1 Pars. Cont. 387; *Seaver* v. *Phelps*, 11 Pick. 304.

F. S. Platt, for the plaintiff.

The witnesses were properly allowed to state the rental

value of the plaintiff's services in caring for the intestate. *R. R. Co.* v. *Bixby*, 57 Vt. 563; *Beeman* v. *R. R. Co.*, 58 Vt. 636.

The opinion of the court was delivered by

ROWELL, J. This is an appeal from the decision and report of the commissioners on the estate of Michael Burns. Plaintiff presented her claim to the commissioners at $2,789.65. The *ad damnum* in her declaration filed in the Probate Court was $3,500. In the County Court she recovered $3,813.49. Thereupon she moved for leave to amend her declaration by raising the *ad damnum* to $4,000, which was granted, and she had judgment for the amount of her recovery.

The identical claim presented to the commissioners was the claim tried above. The amount of plaintiff's recovery rested on the *quantum meruit*. The jury found that she merited more than she estimated her claim when she presented it to the commissioners. But such underestimate did not preclude her from recovering more if the testimony showed her entitled to it, as presumably it did, as more was found. The fact of such estimate was evidence against her deserving more, as it was an implied admission that what she claimed was enough; but the admission was not conclusive upon her, and did not prevent her from recovering more. *Rooney* v. *Minor*, 56 Vt. 527; *Stowe* v. *Bishop*, 58 Vt. 498; *Hard* v. *Burton*, 62 Vt. 314.

It is conceded that in common-law actions the court has power to raise the *ad damnum* at any time; but it is claimed that as the Probate Court is not a common-law court, but is a court of special and limited jurisdiction, and has by statute original jurisdiction of the settlement of the estates of deceased persons, the County Court has no power to raise the *ad damnum* of the declaration filed in the Probate Court.

The County Court has, by statute, appellate jurisdiction of matters originally within the jurisdiction of the Probate Court;

and in such appeals it sits as a higher Court of Probate, and its jurisdiction is coextensive with that of the Probate Court. It is not limited to the particular questions that arose in the Probate Court in the matter appealed, but is expressly extended to matters originally within the jurisdiction of that court. It is an appellate court for the re-hearing and the re-examination of matters, not particular questions merely, that have been acted upon in the court below. *Adams* v. *Adams*, 21 Vt. 162. And these matters embrace even those that rest in discretion. *Holmes* v. *Holmes*, 26 Vt. 536. In *Francis* v. *Lathrope*, 2 Tyler, 372, the claimant was allowed on terms to file a declaration in the County Court, he having omitted to file one in the Probate Court as required by statute. It was within the jurisdiction of the Probate Court to have allowed this amendment, and as the County Court had all the jurisdiction of the Probate Court in this behalf, it also had power to allow the amendment.

The record shows no error in permitting witnesses to testify to the rental value of the house and garden and to what it was worth to board and care for the intestate. That a witness may testify his opinion in respect of such matters, provided he has the requisite knowledge to make him competent, is too well settled in this State to admit of question. But, as this court has said before and here repeats, there is no rule of law defining the amount of knowledge the witness must possess in order to make him competent, though he must possess sufficient to enable him to form some estimate of the value and the worth, but whether he does possess sufficient or not is a preliminary question for the tribunal before which he is called, and its decision is conclusive, unless it appears from the evidence to have been erroneous or founded on an error in law. *Railroad Co.* v. *Bixby*, 57 Vt. 548.

Testimony to the value of the use of the household furniture, if such value was not involved in the case, was harmless to

the defendant, as its only tendency was to lessen the amount of plaintiff's recovery.

Nor was there error in that part of the charge to which exception was taken. It is claimed that it was misleading in that it gave the jury to understand that it was the duty of the guardian to take his ward away from his own home in order to enable the guardian to provide for him, and that he was derelict in that duty. But the charge is not criticisable in this respect. It fairly gave the jury to understand that the guardian had the right to assume the care and support of his ward and to provide for him in the ward's home as well as elsewhere, if he desired to do so.

We think the case shows a state of facts that enabled the ward to contract for his own support. *Stannard* v. *Burns*, 63 Vt. 244.

Judgment affirmed and to be certified.

PILMINGTON DAGGETT *v.* THE TOWN OF MENDON.

Decree of foreclosure. Invalid vote of town may prevent becoming absolute.

The defendant town conveyed certain lands to the plaintiff by deed warranty, taking back a mortgage for the purchase price. Subsequently this mortgage was foreclosed and a decree obtained. Before the decree became absolute the defendant voted, but without any sufficient article in the warning, to extend the time of redemption six months. Before the expiration of this six months, but after the decree would have become absolute by its original terms, the defendant voted, at a meeting duly warned, to give the plaintiff a quit-claim deed upon his paying a sum less than that due on the decree, which was done. *Held*, that the first vote to extend the time of redemption, although invalid by reason of the insufficient warning, would have entitled the plaintiff to have the decree opened; that the decree never became absolute, and that the covenants in the original deed were still in force.

Action of covenant. Pleas, the general issue and in bar. Trial by jury at the September term, 1891, Start J., presiding. At the close of the plaintiff's testimony the court directed a verdict for the defendant. The plaintiff excepts.

The opinion states the facts.

J. C. Baker, for the plaintiff.

Butler & Moloney and *H. A. Harmon*, for the defendant.

When the decree of foreclosure became absolute, the entire estate vested in the defendant and the covenants in the first deed were extinguished. Littleton, s. 743; Coke upon Litt. 490, a; Preston, Touchstone, 201; Raw. Cov., 223; *Brown* v. *Metz*, 33 Ill. 339; *Silverman* v. *Loomis*, 104 Ill. 137; *Goodel* v. *Bennett*, 22 Wis. 565.

Pilmington Daggett *v.* The Town of Mendon.

The opinion of the court was delivered by

TYLER, J. The material facts that had appeared at the conclusion of the plaintiff's testimony, when the defendant moved for a verdict, are as follows: In July, 1872, the defendant town, for the consideration of $1000, by a warranty deed, conveyed to the plaintiff a tract of land situated in that town of which it claimed to have title, and the plaintiff at the same time mortgaged the land to the defendant to secure the payment of $800 of the purchase price, as specified in his four promissory notes of $200 each, payable in different years. At the March term, 1875, of the Rutland Court of Chancery, the defendant obtained a decree of foreclosure against the plaintiff, in which it was ordered that unless the plaintiff pay the defendant the sum of $310.02—which was the part of the debt then due, including costs—on or before the first Tuesday in April, 1876, and the other sums within a year after they respectively became due, and interest, the plaintiff should be foreclosed and forever barred from all equity of redemption in the premises. At its town meeting held March 7, 1876, it was voted to allow the plaintiff six months redemption on the land and to give him a quit-claim deed by his paying the balance due and costs. There was no article in the warrant for the meeting that authorized this vote except the article, "To transact any other business that may be legal at the meeting." At a meeting duly warned and held for that purpose July 22, 1876, the town voted to give the plaintiff a quit-claim deed of the land upon his paying $600 and interest, the town paying the cost of foreclosure. An agent was appointed to make the conveyance, and on July 24th the sum was paid and the conveyance made pursuant to the vote.

This action is for an alleged breach of the covenants in the original deed to the plaintiff. The court sustained the defendant's motion and directed a verdict in its favor.

The defendant now insists that its title to the land became absolute by its decree of foreclosure and the plaintiff's title there-

by extinguished, and that the plaintiff held only by virtue of his deed of quit-claim as upon a new purchase. The plaintiff contends that the quit-claim deed operated as a redemption of the mortgage, and that the covenants in the original deed were in force when the suit was brought.

If the decree became absolute and reinvested the covenantor with the title, then the covenants were no longer in force and the plaintiff had no right of action.

As there was no specific article in the warrant for the March meeting authorizing the vote to extend the time, the vote that was passed did not operate as a perfected legal agreement between the parties by which the time was extended. It was the declaration of a purpose, a proposition to extend it, upon which the plaintiff might rely and which would doubtless have entitled him to an order opening the decree had the town attempted to take advantage of his failure to meet the April payment. The proposition of March 7th ripened into an agreement by the action of the town in July, when the decree was opened, payment accepted and the plaintiff permitted to redeem. In *Pierson* v. *Clayes et al.*, 15 Vt. 93, the Court of Chancery opened a decree of foreclosure, when the failure of the mortgagor to pay, according to the decree, was not through his negligence or default, but in consequence of propositions of settlement and payment, to be carried into effect after the time of payment had expired, and the failure to perform was on the part of the mortgagee. For a full consideration of the law relative to the right of a mortgagor to redeem after the time limited by the decree had expired, where he had been prevented, without his own fault, from making a required payment, see *Kopper* v. *Dyer*, 59 Vt. 477.

We hold that the decree of foreclosure did not become absolute so that the title to the land reinvested in the defendant; that the quit-claim was a redemption and continued the warranty deed in force, and that the plaintiff was entitled to pursue his action according to its merits.

Judgment reversed and cause remanded.

Samuel P. Williams, *Admr.* v. M. Francis Wager *et al.*

SAMUEL P. WILLIAMS, ADMR. *v.* M. FRANCIS WAGER ET AL.

Resulting trusts. Payment of purchase by person other than grantee. Entire payment need not be made at time of conveyance. Evidence. Error.

1. Where upon the purchase of real estate the conveyance of the legal title is made to one person, while the consideration is paid by another, a trust thereby results by implication of law in favor of the person who pays the purchase money, and the facts necessary to raise such trust may be shown by parol.
2. Nor does it alter the rule that the one to whom the conveyance was made is dead.
3. The evidence of such a trust must be clear and satisfactory, but by this it is only meant that the trier of the case must be reasonably satisfied of the fact which the evidence tends to prove; and when the case is referred to a special master to find and report the facts, his finding is conclusive upon the court, certainly unless he reports the evidence upon which that finding is based.
4. A resulting trust cannot be raised by any transactions between the parties subsequent to the passing of the legal title, but it is not necessary that the entire purchase money should be paid at the time of the conveyance. It is enough if the one setting up the trust assumed to pay as a part of the original transaction and subsequently did pay the consideration.
5. A witness may refer to a memorandum made at the time of a transaction for the purpose of refreshing his recollection, and such memorandum is itself admissible in connection with the witness's testimony.
6. Error cannot be predicated upon the reception by a special master of evidence bearing solely upon an issue not involved in the decision of the court.

Bill to establish a trust. Heard upon the pleadings and the report of a special master, at the September term, 1891. Thomp-

son, chancellor, dismissed the bill *pro forma*. The orator appeals.

The orator brought suit as the administrator of Catherine J. Williams, his wife. The bill alleged in substance, that in the year 1864 his said wife had purchased the premises in question of one Kimball, for the sum of $2000; that she paid down the sum of $200, and subsequently paid the remaining $1800 with interest; that at the time of the conveyance it was agreed between herself and one Parmelia M. Wager, her mother, that the conveyance should be taken in the name of her said mother, and that the conveyance was then so taken; that the said Catherine J. went into the immediate occupancy of the premises and continued in said occupation, exercising sole and absolute dominion over them, from the execution of said deed down to the time of her death in July, 1889; that during all this time the legal title to said premises had continued in the said Parmelia M. Wager, who had deceased previous to the death of the said Catherine J.; that the heirs and representatives of the said Parmelia M., the defendants in this suit, laid claim to said premises as a part of her estate, and that her executors had begun and were then prosecuting an action of ejectment for the possession of the same. The orator prayed that this action of ejectment might be perpetually enjoined and that the defendants might be compelled to execute to him a deed of said premises.

The defendants by their answers denied that Catherine J. Williams ever paid any part of the purchase price or had any interest whatever in the purchase of said premises, and asserted that the purchase was made and the purchase money paid by Parmelia M. Wager for her own benefit; that she had always been the owner of the same in her life time, and that the property was then a part of her estate.

The master reported that on the 7th day of October, 1864, one Daniel Kimball, who had deceased previous to the trial, executed and delivered a deed of the premises to the said Parmelia

M. Wager, and that the legal title to said premises still stood in her representatives. The purchase price of said premises was $2000, of which $200 was paid in cash at the time of the conveyance, the deed being conditioned for the payment of the balance on or before October 7, 1868, and the same having been paid according to the terms of said deed. It appeared that the conveyance was made and the purchase money paid to Mr. Kimball, both at the time of the conveyance and subsequently, by one Edward Edgerton, an attorney-at-law, who testified that he was employed by and acted for the said Catherine J. Williams. The only witness whose testimony bore directly upon the question as to who paid the purchase money, and by whom, and for whose benefit the purchase itself was originally made, was the testimony of Mr. Edgerton. He himself had deceased previous to the hearing before the master, but his deposition was introduced upon these various points. In reference to the payment of the purchase price the master reported as follows:

"At the delivery of the deed the sum of $200 was paid in cash, and it was agreed that the remaining portion of the purchase price should be paid as provided in the condition attached thereto. There was no direct evidence to show who in fact paid, or furnished the money with which to make the $200 cash payment, but from all the circumstances surrounding the transaction, as herein related, I find that the money was furnished and payment made by Mrs. Williams.

In respect to all the payments thereafter made, I find that the money was furnished therefor by Mrs. Williams to Mr. Edgerton, who made the payments for her to Mr. Kimball, he keeping an account thereof, a memorandum of which, made by him, hereto attached, marked exhibit "B" was referred to by Mr. Edgerton, in his deposition as a memorandum made at the time, and used by him to refresh his memory while testifying, and was offered and received by me in connection with his deposition, against the objection and subject to the exception of the defendants."

After the execution of the deed, it was delivered to Mr. Edgerton as the attorney for Mrs. Williams, who procured it

to be recorded in the town clerk's office, and afterward delivered it to Mrs. Williams. She retained it in her possession for some time when it finally came into the possession of Mrs. Wager, but at what time and under what circumstances did not clearly appear. Immediately after the execution of the deed, Mrs. Williams went into the possession of the property, and continued in the possession of the same, treating it and managing it in all respects as her own property, and taking to herself the sole use and income from it, down to the time of her death.

The memorandum mentioned in the opinion of the court, was the exhibit "B", which is referred to by the master in the extract from his report above given.

The orator claimed title to the premises by reason of adverse possession as well as by virtue of the original transaction, and as bearing upon this point introduced evidence of the declarations of his wife in her life time, as to the ownership of the property, against the objection and exception of the defendants, and was also permitted to testify himself against their objection and exception in reference to the occupany of the premises by his wife and her claim of title thereto.

J. C. Baker and *C. A. Prouty*, for the orator.

The trust sought to be established in this case is a resulting trust, arising by implication of law, and as such is especially excepted from the operation of the Statute of Frauds. Parol evidence was admissible to establish the facts from which it sprang. R. L. s. 1933; Lewin Trusts, 143, 167; 1 Perry Trusts, s. 124; Pomeroy, Eq. Jur., ss. 1030, 1040; *Boyd* v. *McLean*, 1 John Ch. 582; *Page* v. *Page*, 8 N. H. 187; *Baker* v. *Vining*, 30 Me. 121; *Livermore* v. *Aldrich*, 5 Cush. 431, 434; *Pinney* v. *Fellows*, 15 Vt. 525; *Pinnock* v. *Clough*, 16 Vt. 500; *Barron* v. *Barron*, 28 Vt. 375; *Clark* v. *Clark*, 43 Vt. 685.

The rule here contended for is not at variance with *Salisbury* v. *Clark*, 61 Vt. 453. In that case the deed was to the grantee upon an expressed consideration, and it has always been held

not permissible in such case to contradict the deed by showing that in fact there was no consideration. *Pom. Eq. Jur.*, s. 1036.

Although there is some intimation in the earlier cases that parol evidence is not admissible after the death of the nominal purchaser, the law is now settled the other way. *Pinney* v. *Fellows*, 15 Vt. 525, 538; Lewin Trusts, 130.

The evidence to establish the fact of the payment by Mrs. Williams must be clear, but if it satisfied the master, this court cannot say that it was not sufficient. *Jackson* v. *Stevens*, 108 Mass. 94.

The testimony as to the declarations of Mrs. Williams was admissible upon the question of adverse possession. *Wood Lim* s. 268, p. 510, note 6; *Hollister* v. *Young*, 42 Vt. 407.

Edson R. Harder and *Henry A. Harmon*, for the defendant.

Only $200 was paid at the time of the conveyance, and if any trust results it can only be *pro tanto* to the extent of this payment. No resulting trust can be raised by payments upon the part of the supposed beneficiary made after the conveyance. *Pinney* v. *Fellows*, 15 Vt. 525; *Pinnock* v. *Clough*, 16 Vt. 500; *Dewey* v. *Dewey*, 35 Vt. 560; *Botsford* v. *Burr*, 2 Johns. Ch. 405; *Steere* v. *Steere*, 5 Johns. Ch. 1; *Rogers* v. *Murray*, 3 Paige, 390, 397; *White* v. *Carpenter*, 2 Paige, 238.

Parol evidence cannot be resorted to, to establish a resulting trust of this kind after the death of the nominal purchaser. 2 Atk. 150; *Hooper* v. *Eyles*, Vernon, 480.

The evidence in this case is not sufficiently clear and satisfactory to establish the facts from which the trust results. *Ex parte* Vernon, 2 P. Wms. 549; *Goodwin* v. *Lister*, 3 P. Wms 387; *Faringer* v. *Ramsey*, 4 Md. Ch. 33; *Butler* v. *Tuttle*, 19 N. J. Eq. 560; *Miller* v. *Blose*, 30 Gratt. 745; Appeal of Walter, 8 Atl. 406; Appeal of Jackson, 8 Atl. 870; *Botsford* v. *Burr*, 2 Johns. Ch. 409.

The memorandum was improperly admitted as evidence.

Lapham v. *Kelley*, 35 Vt. 195; *National Bank* v. *Madden*, 23 Abb. N. C. 123.

The opinion of the court was delivered by

TYLER, J. The master has found that the premises were purchased and paid for by Mrs. Williams. The defendants in their answer deny that Mrs. Williams made the payment of $200 at the time the deed was delivered, and aver that Mrs. Wager made that payment. Mr. Edgerton, the attorney, testified that he had no distinct recollection of actually taking the money into his hands and handing it to Mr. Kimball, the grantor, that he remembered the fact that $200 was then paid and the remaining $1800 secured by the condition in the deed, and that none of the money came from Mrs. Wager.

The general rule is that in order to establish a trust by parol evidence in opposition to the recital in a deed, the evidence must be clear and positive. Adams' Eq. 33. The evidence must be full, clear and satisfactory. *Freeman* v. *Kelley*, 1 Hoff. 90, note; Lewin on Trusts, 167, speaks of a considerable weight of evidence to overcome the solemnity of the oath in the defendant's answer. Nothing more can be meant by the rule than this, that the trier of the case, whether it is the court or one of its masters, must be reasonably satisfied of the fact which the evidence tends to prove. In this case it was for the master to decide the question upon the weight of the evidence produced before him. He was not requested to return the evidence to the court and did not voluntarily return it, so that the court might determine whether or not there was sufficient ground for his finding. He finds, "from all the circumstances surrounding the transaction that the $200 was furnished and payment made by Mrs. Williams." That question is therefore settled by the master, as one of fact within his province to try and determine.

The defendants' counsel do not contend that parol evidence is inadmissible to establish a trust. Our statute, which is in substance a re-enactment of 29 Car. 2, is as follows: "No trust

concerning lands, excepting such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing, signed by the party creating or declaring the same, or by his attorney." R. L. 1933. This statute has been adopted by most of the States and it is generally held in this country that resulting trusts are not within the statute and may be proved by parol. In England it is very doubtful whether such evidence would be admitted against the answer of the defendant. Adams' Eq. 33, note.

A resulting trust by presumption of law arises where the legal qwnership of property has been disposed of, but it is apparent from the language of the disposition itself or from the attendant circumstances, that the equitable ownership or beneficial interest was intended to go in a different channel, although there is no declaration, or no sufficient declaration, as to what that channel should be. In this case a trust is implied for the real owner, termed a resulting trust, or trust by operation of law; and such a trust, although relating to real estate, is exempted by a proviso in the statute of frauds from the necessity of being declared or evidenced in writing. Adams' Eq. 31.

In the case of *Livermore* v. *Aldrich et al.*, 5 Cush. 431, it was held that: "When land is purchased, and the conveyance of the legal estate is taken in the name of one person and the consideration is paid by another, the trust of the legal estate results to the person who advances the purchase money, and the party named in the conveyance is a trustee for the party from whom the consideration proceeds. So, if only a part of the purchase money is paid by the third party, there will be a resulting trust in his favor *pro tanto*. It is also well settled, that though it is expressed in the deed that the consideration was paid by the grantee, yet parol evidence is admissible to show that the consideration was in fact paid by a third person, for the purpose of establishing a resulting trust in favor of such third person. The admission of parol evidence in such cases, it is fully settled, does not

come within the prohibition of the statute." * * * *Botsford* v. *Burr*, 2 Johns. Ch., Law. Ed. 405 and notes; Pom. Eq. Jur. 1037-1040; Hill on Trustees 96; 2 Wash. Real. Prop. 517; *Brison* v. *Brison*, 75 Cal. 525, (7 Am. St. R. 183 and note. This court has held the same doctrine, that where one person purchases lands with his own money and takes a deed to another a trust results by operation of law to the person making the purchase. *Pinney* v. *Fellows*, 15 Vt. 525; *Pinnock* v. *Clough*, 16 Vt. 500; *Barron* v. *Barron et al*, 24 Vt. 375; *Dewey* v. *Dewey*, 35 Vt. 555; *Clark* v. *Clark*, 43 Vt. 685.

The defendants' counsel insist that a resulting trust cannot in any event be claimed except as to the $200 which was paid when the deed was executed and delivered. It is well settled that the trust must arise from the original transaction. It is created, if at all, by the transactions incident to the conveyance, and at that time, and not by any subsequent transactions between the parties. When the legal title has once passed, a resulting trust cannot be raised upon it by subsequent acts or agreements of the parties. But the assumption of payment of a part of the consideration money is as much a part of the transaction as the actual payment of a part. It must be conceded that there was a trust *pro tanto*, arising from the facts that the $200 was paid by Mrs. Williams, and that Mrs. Wager was a mere nominal grantee; then there is no ground for maintaining that a trust did not result as to the $1800, which, as a part of the transaction, was promised and secured to be paid by Mrs. Williams, and was subsequently paid by her according to the condition in the deed. We apprehend that nothing further is intended by the authorities on this subject than that the consideration *must be paid or assumed to be paid* by the *cestui que trust* at the time of the conveyance, so that the trust results then and not afterwards. In *Botsford* v. *Burr*, *supra*, $90 of the amount to be paid was in fact paid by the plaintiff; it was not claimed that any further payment was made or promised by him at the time of the con-

veyance, but that he afterwards assigned a certain note for the same purpose. It was held that there was a trust only to the extent of the $90.

Steere v. *Steere*, 5 Johns. Ch. 1, *Rogers* v. *Murray*, 3 Paige 390, and the other case cited by the defendants' counsel on this point merely recognize the doctrine that, after the legal title has once passed to the grantee, by deed, it is impossible to divest the legal estate and raise a resulting trust by the subsequent advancement of funds. In *Pinney* v. *Fellows*, *supra*, which is relied upon, Mrs. Pinney claimed to be the *cestui que trust*: it appeared that she paid $100 of the consideration at the time of the purchase, and that her son, who was the alleged trustee, gave his own notes for the remaining $300 which Mrs. Pinney did not assume and was under no obligation to pay, though she did subsequently pay them for her son. Bennett, J.. said: "If, then, Mrs. Pinney had, at the time of the purchase, paid the full consideration money, the law, out of that fact, would have raised the trust. Though it has been sometimes questioned, yet it is now well settled, that a part payment of the consideration, at the time of the purchase, will charge the land with a trust *pro tanto*." The other Vermont cases cited are authorities only as to the general rule of law that the payment must be made at the time of the purchase. In *Dewey* v. *Dewey*, *supra*, Poland, Ch. J., commented upon the holding in *Pinney* v. *Fellows*, that the trustee's written testimony given long after the conveyance and after the rights of his creditors had intervened by attachments, was sufficient to satisfy the statute and uphold the trust as to the $300, and said: "For myself, I must say that this mode of upholding the trust is wholly unsatisfactory, and seems frivolous and absurd, though I should say that her entering upon the land, paying off the mortgage, and her long and open posession of the land, which was notice to all the world of her title, was suffi-

cient to entitle her to claim a conveyance, on the ground of a full performance."

We have been referred to no case, nor have we been able to find one, which holds that giving security for the payment of the purchase price by the *cestui que trust*, at the time of the conveyance, when there is a subsequent paynent in fact, is not equivalent to a payment at the time of the purchase. In Adams' Eq. 33 note it is said that the money must have been actually paid by the alleged *cestui que trust*, out of his own or borrowed funds, or secured to be paid at or before the time of the purchase. It is not necessary to show that the purchase money was actually paid at the time of the conveyance; it would be sufficient to show that it was paid in pursuance of the contract by which the purchase was made. 2 *Wash. Real Prop.* 518. In *Freeman* v. *Kelley*, 1 Hoff. 90, in referring to *Botsford* v. *Burr*, the court said: "I do not think, therefore, that this case or any other, has expressly decided that where there is clear proof of a prior payment coupled with clear proof of subsequent payments, all on account of the purchase, proof of an agreement to purchase for the use of the payee shall not be let in. The opinion of Lord Northington in *Bartlett* v. *Pickersgill*, Eden, 515, as well as the case *Wray* v. *Steele*, 2 Ves. & B. 385, appear to justify its admission." In the note of *Botsford* v. *Burr*, Mr. Desty says: "it is essential that the party setting up the trust shall have paid or become bound for the purchase money on his own account, and as a part of the original transaction of purchase." In 2 Pom. Eq. Jur. s. 1037, nearly the same language is used. In *Blodgett* v. *Hildreth*, 103 Mass. 484, the court said: "It need not be money advanced or paid at the time of the conveyance. The mode, time and form in which the consideration was rendered are immaterial, provided they were in pursuance of the contract of purchase. It is sufficient if that which in fact formed the consideration of the deed moved from the party

for whom the trust is claimed to exist, or was furnished in her behalf or upon her credit. The trust results from the purchase and payment of the consideration by or for one party, and the conveyance of the land to another."

That parol evidence is admissible as well after the death of the nominal purchaser as in his life-time is now well settled, though it seems to have formerly been a disputed question. Lewin on Trusts., 130; Hill on Trustees, 96, and numerous cases cited in the notes; *Botsford* v. *Burr*, *notes; Pinney* v. *Fellows*, p. 538, and cases there cited.

Three exceptions are insisted upon by the defendants relative to the admission of evidence:

The master states that Mr. Edgerton was permitted to refer to a memorandum made by him at the time of the conveyance of the property, to refresh his recollection, and that the memorandum was not received as independent evidence. This comes within the rule *Lapham* v. *Kelley*, 35 Vt. 195, and *Davis & Whittaker* v. *Field*, 56 Vt. 426, and there was no error in receiving it for the purpose for which it was offered.

Evidence of Mrs. Williams' statements to her ownership of the property, made at various times while she was in possession, bears upon the question of adverse possession. The testimony of the orator bears upon the same question. As we do not dispose of the case upon that ground this evidence becomes unimportant.

Decree reversed and cause remanded with mandate that the defendant, M. Francis Wager, be perpetually enjoined from prosecuting the action of ejectment, set up in the bill, and that the orator have a decreee for a transfer of the legal title to the property by the defendants to him, according to the prayer of the bill.

VICTORIA A. JOHNSON *v.* VALIDO MARBLE CO. ET AL.

Equitable lien of mortgagee to insurance money. Prior mortgagee not bound to notice subsequent record. What facts will put upon inquiry. When principal affected by knowledge of agent. Wife not bound by acts of husband without her authority. Priority of liens. Evidence. Husband and wife. Party may testify to capacity in which he acted, if disclosed.

Adams held a first mortgage against the property of the Valido Marble Company, of which the husband of the oratrix was treasurer and general manager. The defendants held a second mortgage from that company of the same premises to secure the payment of certain bonds; and this second mortgage contained a stipulation that the mortgagor should keep the premises insured for the benefit of the mortgagees. Adams had begun a foreclosure of his mortgage previously to the making of the defendants' mortgage. After the decree of Adams had become absolute, but in virtue of an arrangement made with him before, the oratrix paid him the amount of his decree and took from him a quit-claim deed of the premises. Her husband acted as her agent in paying the money and taking the conveyance. After taking this conveyance she gave to the Valido Company a written obligation, that she would re-convey to it upon being repaid the amounts advanced by her, and still later executed a conditional deed of that tenor. By these instruments it was provided that the company should keep the premises insured for her benefit, and that in the event of loss the insurance money might, if the parties agreed, be used in rebuilding the premises. The company did so insure the premises, the buildings were destroyed by fire; and an amount of insurance was paid sufficient to satisfy the entire debt of the oratrix, and was by her passed over to the company to be used in rebuilding, but was not in fact used for that purpose. The husband of the oratrix acted as her agent in settling with the insurance companies. The oratrix did not know of the defendants' mortgage but did know that

there were outstanding bonds against the company. *Held*, that the fact that the oratrix suffered the company to retain the insurance money did not work a payment of her debt, nor estop her from asserting the same as a prior lien against the defendants, for

1. While, if the mortgagor convenants to keep the mortgaged premises insured for the benefit of the mortgagee, the mortgagee will have an equitable lien as against the mortgagor upon the proceeds of an insurance actually affected, although not in terms for the benefit of the mortgagee;
2. Still such lien will not be good as against a prior mortgagee, who neither has nor ought to have knowledge of the subsequent mortgage.
3. The record of the second mortgage was not constructive notice to the oratrix.
4. Nor was knowledge of the fact that bonds were outstanding sufficient to put her upon inquiry as to how those bonds were secured, or whether they were secured at all.
5. She did not stand affected with the knowledge of her husband since the matters in which he acted as her agent in no way involved the existence of the defendants' mortgage.
6. Nor would she be bound by an agreement which he executed in reference to these matters without her authority.
7. The checks for the insurance money were made payable to the order of the oratrix, and were by her endorsed and delivered to her husband, as the general manager of the Valido Company. He in fact deposited them to the credit of the oratrix, and drew the proceeds out upon checks signed in blank by her, but without her knowledge that the money had been so deposited or for what purpose the checks were to be used. *Held*, that the rights of the oratrix were not thereby affected.
8. At the time the defendants took their mortgage Adams had an attachment lien against the premises which subsequently became a judgment lien maturing before the decree of forclosure became absolute. The amount of the judgment was something more than $3000, and the amount of the decree something less than $10,000, the two aggregating over $13,000. The oratrix arranged with her husband, as the manager of the Valido Company, that she would advance $13,000 to pay off these encumbrances and take the security of Adams. Pursuant to this arrangement she paid her husband $3,000 for the Valido Company, and that company with this and additional money of its

own paid the judgment. Later she paid her husband $10,000 more to satisfy the decree. After the decree had become absolute in Adams, he was paid the amount of his decree, being less than $10,000, and thereupon quit-claimed to the oratrix; who agreed to re-deed to the Valido Company, upon re-payment of the entire $13,000. *Held*, that the oratrix thereby acquired a lien superior to the defendants' mortgage to the extent of the entire $13,000.

9. Her husband might properly testify in behalf of the oratrix to matters in which he did not act as her agent, unless objection was made thereto for that he was her husband. *Held*, that the objection interposed in this case to his testimony was not upon that ground.

10. He might so testify that the insurance money drawn from the bank upon the blank checks of the oratrix was used for the benefit of the Valido Company without producing the checks.

11. He might also testify that he received the checks for the insurance money from the oratrix as the manager and in behalf of the Valido Company, and not as her agent.

Bill in chancery to foreclose a lien in the nature of a mortgage. Heard upon bill, answers, and a master's report at the September term, 1891. Thompson, Chancellor, dismissed the bill *pro forma*. The oratrix appeals.

From the master's report the following facts appear:

In the year 1884 the premises in question were owned by one Adams, who, on the 1st day of July in that year conveyed the same to the Valido Marble Company by deed conditioned for the payment of certain promissory notes. On the 18th day of December, 1885, Adams began an action at law against the Valido Company and attached the premises in question; said suit was made returnable to the Rutland County Court, and was there prosecuted from term to term until at the January term of the Supreme Court, 1889, he obtained judgment, and on the 21st day of January, 1889, execution issued in his favor for the sum of $3,839.84 damages and costs.

Soon after beginning his suit at law Adams also instituted proceedings to foreclose his conditional deed, the terms of which had not been complied with by the Valido Company, and on

there were outstanding bonds against the company. *Held*, that the fact that the oratrix suffered the company to retain the insurance money did not work a payment of her debt, nor estop her from asserting the same as a prior lien against the defendants, for

1. While, if the mortgagor convenants to keep the mortgaged premises insured for the benefit of the mortgagee, the mortgagee will have an equitable lien as against the mortgagor upon the proceeds of an insurance actually affected, although not in terms for the benefit of the mortgagee;
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3. The record of the second mortgage was not constructive notice to the oratrix.
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5. She did not stand affected with the knowledge of her husband since the matters in which he acted as her agent in no way involved the existence of the defendants' mortgage.
6. Nor would she be bound by an agreement which he executed in reference to these matters without her authority.
7. The checks for the insurance money were made payable to the order of the oratrix, and were by her endorsed and delivered to her husband, as the general manager of the Valido Company. He in fact deposited them to the credit of the oratrix, and drew the proceeds out upon checks signed in blank by her, but without her knowledge that the money had been so deposited or for what purpose the checks were to be used. *Held*, that the rights of the oratrix were not thereby affected.
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Soon after beginning his suit at law Adams also instituted proceedings to foreclose his conditional deed, the terms of which had not been complied with by the Valido Company, and on

the 10th day of April, 1888, he obtained a decree against the premises for $8,875.68, on or before one year from date with interest from the date of the decree.

November 10, 1887, the Valido Marble Co., by deed of that date properly executed, mortgaged to the defendants, Harmon and Cheney, as trustees, the premises in question to secure the payment of seventy-five bonds of $1,000 each, which were to be issued under the provisions of said mortgage. This deed was duly recorded and the bonds described therein were issued from time to time, and were outstanding and unpaid; of these the defendants, Guy H. Reynolds and John B. Reynolds, were the owners of about one-half, the balance being held by parties whose names did not appear.

William H. Johnson, the husband of the oratrix, was in the spring of 1889, and had been for some time the treasurer and general manager of the Valido Marble Co. As such he made efforts from time to time to raise the funds necessary to pay off the execution and decree of Adams, as aforesaid, but without success. As the time when these liens would become absolute drew near, the said William H. Johnson, being unable to raise the money with which to satisfy them, and being apprehensive that the property would go in satisfaction of these liens, applied to his wife, the oratrix, representing to her that the two liens amounted to about $13,000; that the security was ample, and requested her to advance the sum of $13,000 for the payment of said liens, she to take the security then held by Adams, which was a first lien upon the property. The oratrix replied that she had not then, February, 1889, $13,000 at her command, but that if some arrangement could be made by which a portion of this sum could be paid then, and the balance later, she could and would comply with the request of her husband. Thereupon her husband sought an interview with the solicitor of Adams, for the purpose of ascertaining whether some arrangement might not be made for a delay as to the payment of a portion of the indebted-

ness, and was informed by him that if the amount of the execution was paid then, some further time might be given upon the decree, but no definite arrangement was then concluded. In accordance with this suggestion, the oratrix early in the month of February delivered to her husband $3,000, with which to help pay the execution, upon the understanding that she was to raise the remaining $10,000 with which to pay the balance due upon the execution and decree, and that she was to take Adams' security as to the whole $13,000. The $3,000 so furnished by the oratrix was used by her husband in paying the Adams execution, the balance due upon it being paid by him out of other funds from some other source. This payment was made on the 18th day of February, 1889.

Subsequent to the time when the oratrix advanced the $3,000 to apply upon the execution, an arrangement was made between the oratrix and Adams, the oratrix acting through one Maynard, as her agent, to the effect that the decree should be allowed to become absolute, that within a certain time Adams should be paid the amount due on his decree with interest, and should thereupon quit-claim the premises to said Maynard, who in his turn was to convey them to the oratrix. In pursuance of this understanding the decree was allowed to become absolute, Adams was paid the amount his due on the same, and did on the 10th day of June, 1889, quit-claim the property to Maynard, who, on the same day, quit-claimed it to the oratrix. The oratrix at this time furnished her husband the sum of $10,000, being the balance necessary to make up the entire sum of $13,000, and out of the $10,000 so furnished Adams was paid whatever sum was paid him on the decree. Just what that sum was did not appear. The expressed consideration in the deed was $9,499.18.

On June 12th the oratrix executed and delivered to her husband, as manager of the Valido Marble Co., a writen agreement to re-convey to that company the property so deeded to her upon payment of the $13,000 advanced by her, with interest. And

subsequently, on the 12th day of November following, the oratrix and her husband joined in a conditional deed to the Valido Company of the same tenor. In both the written agreement and the deed it was provided that the property should be insured for the benefit of the oratrix, and that in the event of loss, if the parties so agreed, the insurance money might be used in rebuilding the premises.

Pursuant to this agreement the Valido Marble Company did effect insurance for the benefit of the oratrix, and certain policies which had been previously taken out for the benefit of Adams, were by him transferred and assigned to the oratrix.

On the 21st day of July, 1889, one of the mills of the company was destroyed by fire. The oratrix was willing to allow a considerable portion of the money advanced by her to remain, provided the property destroyed could be replaced and the security kept good, and an agreement was made between the Valido Marble Company and the oratrix that she should be repaid the $3,000 which she had first advanced to apply on the execution, and the interest on the whole up to October 1st, 1889, and that the remaining $10,000 might be used by the company for the purpose of rebuilding and continuing its business.

Agreeably to this arrangement the oratrix was paid the sum of $3,000 and the interest on the whole to October 1st, 1889, and the balance of the insurance money was turned over to the Valido Company.

The mortgage of the defendants provided that the Valido Company should keep the premises fully insured for the benefit of the mortgagees. The oratrix did not know of the existence of this mortgage, but did know that there were bonds outstanding against the company. After the fire and before the arrangement between herself and the Valido Company as to the insurance money was perfected, the oratrix several times saw and conversed with the defendants, Harmon and Cheney, and also with the defendants, John B. Reynolds and Guy H. Reynolds, and no one

of these persons advised her of the existence of the mortgage to the defendants nor that it was her duty to apply the insurance money in liquidation of her indebtedness.

The money paid in liquidation of the loss was all by checks to the order of the oratrix and some other person, sometimes Adams and sometimes the Valido Company, and the entire amount was more than the amount of the oratrix's debt. The oratrix endorsed these checks and delivered them to her husband as the manager of the Valido Company and for it, in pursuance of their arrangement. The Valido Company at that time was hard pressed financially, and the husband of the oratrix apprehended that if it were known that any considerable sum of money was deposited to its credit it might be embarrassed by the beginning of trustee suits. He accordingly deposited in the Allen National Bank to the credit of his wife an amount of this insurance money equal to or exceeding the amount of the indebtedness of the Valido Company to her, and these sums were afterwards drawn out by him upon checks signed in blank by the oratrix. The oratrix did not know that the money was so deposited in her name nor did she know for what purpose the checks signed in blank by her and delivered to her husband were to be used.

Her husband testified, against the objection and exception of the defendants, without producing the checks, that the money so drawn out went to the use of the Valido Marble Company. He also testified against the objection and exception of the defendants, that he received these insurance checks from his wife as the manager of and in behalf of the Valido Marble Company, in pursuance of the arrangement which he, as the representative of such company, had previously made with her in respect of the disposition of the insurance money.

Soon after the fire, John B. Reynolds commenced suits against the oratrix and the Valido Marble Company, in which he claimed to recover a large amount, and in which the insur-

ance companies were summoned as trustees. On the 23d day of September, 1889, there was a meeting at Albany, N. Y., at which the defendants, Guy H. Reynolds and John B. Reynolds, the husband of the oratrix, and several others, stock-holders and directors of the Valido Company, were present. An agreement was there entered into respecting the suits above mentioned and certain other matters, by which it was provided that the oratrix was to convey the property to the company and receive from the insurance the amount due her. The master found that William H. Johnson had no authority to represent the oratrix at this meeting, that she had no knowledge that any such meeting had been held until sometime afterwards, and never knew what the terms of the agreement were.

The defendants claimed that William H. Johnson was the general agent for the oratrix. In respect to that claim the master's report contained the following statement:

"At the special request of the defendants, made since the draft of this report was submitted to them, the master reports that the oratrix, in one portion of her testimony, made use of the following language:

"Mr. Johnson has acted as my general agent ever since we were married and has authority to act as such. Since my connection with the Valido Company he has done my business rather than myself."

Q. By Mr. Moloney.—"You mean to state that he was your general agent in all matters?"

Ans. "Yes."

But the Master further states that her evidence, when considered altogether, does not indicate, nor does the other evidence in the case show, that Mr. Johnson has ever been her general agent in the sense that he could bind her without her consent. They have lived a good portion of their married life in the city of New York, where the oratrix is the owner of more or less real estate. The evidence shows that Mr. Johnson held a general power of attorney from his wife to collect rents upon her real estate in that city, and to deposit moneys so collected to her

credit in some bank in which she kept an account; and that she sometimes signed checks and delivered them to him to use for purposes understood between them; she also, on many occasions, gave him special authority to act for her in matters agreed upon between them.

The agreements connected with the transactions involved in this proceeding were made by her personally with her husband, as the representative of the Valido Company, except the one between her and Adams, which was made through the intervention of her husband and Maynard; and he had no authority to do anything for her only as the different propositions were separately talked over between them and her consent and direction were obtained. In the matter of the insurance money, while it appears that her husband acted for her in the settlement with the insurance companies, it does not appear that he had authority, or that he tried to act in reference to the disposition of the money after it was received, nor that he had any authority to act for her in the settlement of any differences between herself and said Reynolds."

William H. Johnson was offered by the oratrix as a witness in her behalf. The defendants objected "to any evidence relating to transactions with his wife without it first appears that he had authority as general manager to enter into the same;" later "upon the ground that it did appear that the witness was the general agent of the oratrix, and that his knowledge was her knowledge."

C. A. Prouty and *Geo. E. Lawrence*, for the oratrix.

The oratrix is entitled to a lien against the premises for the entire amount advanced by her. The Adams liens were both superior to the liens of the defendants and amounted to more than $13,000. The arrangement with the oratrix was that she should advance $13,000 and take the security of Adams. When she advanced the last $10,000, the title had become absolute in Adams

and the defendants had no claim against the premises whatever. The defendants should not be allowed to assert such claim, except in virtue of and in accordance with the arrangement by which the oratrix advanced her money and took her security. The only right the defendants have is in virtue of the written agreement of the oratrix, and they can only insist upon that agreement as an entirety, if at all. In equity a lien may be treated as in force in reference to a subsequent lien, although legally the prior lien has been discharged. *Seymour* v. *Darrow*, 31 Vt. 122; *Thorpe* v. *Durbon*, 45 Iowa, 192; *Eggeman* v. *Eggeman*, 37 Mich. 436.

The oratrix had no knowledge in fact of the trust mortgage held by the defendants, and there is nothing in the case which can charge her with such knowledge. Jones Mort., s. 562; Pom. Eq. Jur., ss. 1188, 1199; *McDaniels* v. *Colvin*, 16 Vt. 300; *Seymour* v. *Darrow*, 31 Vt. 122.

The deposit of the insurance money in the Allen bank to the credit of the oratrix did not effect a payment of her indebtedness. There was no appropriation of the fund to that purpose. Jones Mort., ss. 904, 905.

The defendants made no objection to the testimony of Mr. Johnson, for that the husband could not testify in his wife's behalf.

Butler & Moloney and *H. A. Harman*, for the defendants.

The defendants have an equitable title to the insurance money by reason of the stipulation in their mortgage, that insurance should be effected in their behalf, although not in fact named in the policies. *Thomas* v. *Vonkapf*, 6 Gill & J. 372; *Prov. Co. Bank* v. *Benson*, 24 Pick. 204; *Nichols* v. *Baxter*, 5 R. I. 491; *Plympton* v. *Farmers*, &c. Co., 43 Vt. 497; *Miller* v. *Aldrich*, 31 Mich. 408; *Doughty* v. *Van Horn*, 29 N. J. Eq. 90; *Wheeler* v. *Ins. Co.*, 101 U. S. 439; *Ames* v. *Richardson*, 29 Minn. 330; *Nordyke M. Co.* v. *Gerry*, 112 Ind. 535; *Wilson* v. *Hakes*, 36 Ill. App. 539.

It was the duty of the oratrix to have applied the insurance money in payment of her indebtedness. Not having done so she cannot now set up that indebtedness as a lien prior to the mortgage of the defendants. *Kernochan* v. *Ins. Co.*, 17 N. Y. 428; *Cone* v. *Ins. Co.* 60 N. Y. 619, (624); *Pendleton* v. *Elliot*, 67 Mich. 496; *Blaisdell* v. *Stearns*, 16 Vt. 179; *Stafford* v. *Ballou*, 17 Vt. 329; *Lyman* v. *Lyman*, 32 Vt. 79; *Root* v. *Collins*, 34 Vt. 173.

The oratrix can at all events assert no lien in a greater amount than the sum due on the Adams decree. The transaction was in effect an assignment of that decree to her. *Dana* v. *Binney*, 7 Vt. 493; *McDonald* v. *McDonald*, 16 Vt. 630; *Dunshee v. Parmelee*, 19 Vt. 172; *Seymour* v. *Darrow*, 31 Vt. 122; *Chandler* v. *Dyer*, 37 Vt. 760.

The oratrix must stand affected with the knowledge of her husband, who acted in those matters as her agent. *Hart* v. *Far. & Mech. Bank*, 33 Vt. 252; *Abell* v. *Howe*, 43 Vt. 403, (409).

It was error to permit the husband of the oratrix to state in what capacity he received the checks for the insurance money. *Farmers & Mech. Bank* v. *Trans. Co.*, 23 Vt. 206; *Ball* v. *Farley*, 81 Ala. 288; *Fertilizer Co.* v. *Reynolds*, 79 Ala. 497; *Hamburg* v. *Wood*, 66 Tex. 168; *Pope* v. *McGill*, 12 N. Y. s. 306; *Fosdick* v. *Vanersdale*, 41 N. W. 931; *Doty* v. *Stanton*, 2 N. Y. s. 417; *Sowrie* v. *Salz*, 17 Pa. 232.

The opinion of the court was delivered by

MUNSON, J. The complainant's interest in the premises sought to be foreclosed was derived from one Adams, who held a first mortgage of the property, and obtained a decree thereon, which became absolute. The suit is defended on behalf of the holders of bonds secured by a mortgage subsequent to that of Adams. No question is made but that the complainant obtained by her deed from Adams' grantee security to the amount of the Adams decree. The claim is that as to the bondholders this demand was satisfied by the payment of insurance money.

The agreement in the second mortgage to keep the buildings insured for the benefit of the trustees, gave them an equitable lien upon the insurance money as against the Valido Marble Company. But the complainant would not be affected by the lien thus established unless she knew, or should have known, of the stipulation. The master finds that the complainant had no actual knowledge of the second mortgage nor of the stipulation contained in it; and it is contended in her behalf that the matters that came to her knowledge were not sufficient to charge her with the duty of inquiry.

The mortgage to the trustees was duly recorded; but it is well settled that the record of a subsequent mortgage does not charge a prior mortgagee with knowledge of it. The law does not throw upon a mortgagee the duty of examining the records from time to time to ascertain whether another has taken security upon the land covered by his mortgage. If the second mortgagee wishes to insure the retention of all the security for the satisfaction of the prior incumbrance, he must bring the knowledge of the second mortgage home to the holder of the first. 1 Jones Mortg. s. 562.

But the defendants insist that the complainant's knowledge of the fact that there were bonds in existence was sufficient to put her upon inquiry, and thus charge her with a knowledge of the mortgage and its contents. The bonds may have contained recitals the knowledge of which would have thus charged the complainant; but we think that information limited to the fact of their existence did not cast upon her the duty of inquiry. Notice of an incumbrance puts one upon inquiry as to the particulars of the indebtedness, but knowledge of the existence of a debt does not put one upon inquiry to ascertain whether it is secured.

It is further insisted that the husband of the complainant so far acted as her agent that his knowledge of the equitable lien arising from the stipulation in the second mortgage must be im-

puted to her. The master finds that the husband was the agent of the complainant only in such transactions as he was specially authorized to attend to. All the arrangements with Adams, including the provisions for the complainant's security, were made through one Maynard; but the master further reports that in making the arrangements by which the security of the complainant might be perfected, the complainant's husband acted as her agent. It is evident from the other findings that this can refer only to the procurement of the necessary papers. Was the husband's agency in that matter such as to charge the complainant with his knowledge of the existence of the second mortgage and the insurance clause contained it it? We think not. The existence of that provision in no way touched the completeness of the complainant's security. No events had yet transpired to make the provision of any importance to her. There was then nothing in existence upon which the lien could attach. We think it cannot be held that it was the duty of the husband, in rendering this service at this time, to call to mind and inform his wife of that provision.

The husband is also found to have acted for the complainant in settling with the insurance companies; but he is found to have acted for the corporation and not for the complainant in the subsequent transactions concerning the money received. We do not think the agency as thus limited by the findings was such as will charge the complainant with her husband's knowledge. The adjustment of the insurance was a matter that was to be attended to in any event, whether the money was to be held by the complainant in satisfaction of her mortgage, or be suffered to pass into the hands of the mortgagor. The equitable lien had no bearing upon the complainant's right to make the collection, and therefore it was not the duty of her agent in the matter of the collection to inform her of it.

This being the complainant's situation as regards the equitable lien of the defendants, she could waive her right to retain

the insurance money without losing her security, unless she was precluded from doing so by the agreement entered into at Albany. The defendants insist that the complainant is bound by that agreement, and that its provisions were such that she could not suffer the insurance money to go into the hands of the corporation without giving priority to the defendants' security.

Among the participants in the Albany meeting were the defendants Reynolds, holders of a large amount of the bonds, and Johnson, the complainant's husband. It is not necessary to construe the terms of the memorandum then executed, nor consider the effect upon it of the failure of the defendant John B. Reynolds, to discontinue his suits; for the master finds that Johnson had no authority to represent the complainant at that meeting nor in the matters then adjusted, that she had no knowledge of the meeting until sometime after it was held, and was not then informed that it affected her interests. Certainly, if the memorandum itself had been submitted to her inspection, it would not have suggested to her the existence of any equitable lien upon the insurance money. Everything contained in it would have been explained by the fact that the payment of the insurance had been delayed by trustee suits in favor of John B. Reynolds.

It is further suggested in behalf of the defendants that the receipt and indorsement of the insurance checks by the complainant, and their deposit to her credit in the ordinary course, operated as a payment of the debt secured, and that in subsequently transferring the money to the corporation by her checks she made a new loan which stands unsecured, or at least subordinate to the defendants' mortgage. But before this was done the complainant, acting for herself, had agreed with her husband, acting for the corporation and by authority expressly given, that the insurance money should be taken by the company for use in the erection of new buildings; and what was done must be considered in connection with this fact. The insurance was payable

to the complainant and the checks for it would, in the regular course of business, be made payable to her order, and her endorsement would thus become necessary to enable the company to receive the money. This would not operate as a payment of the complainant's mortgage in the absence of any intention on the part of the parties to the mortgage that it should so operate; certainly not in the face of their actual agreement to the contrary.

The deposit to the complainant's credit of the checks so endorsed, and the subsequent transfer of the funds to the company by checks signed by her in blank, were without her knowledge; and inasmuch as the entire proceeding by which she was put in the position of collecting the checks and afterwards transferring the avails to the company was without her authority, we do not see that the case stands differently from what it would if the checks had been deposited to the credit of the company when she delivered them properly endorsed to its agent.

Our attention has thus far been directed to that part of the complainant's demand which represents the Adams decree. It is now necessary to consider the situation of that portion of her claim which had its origin outside of the decree. The three thousand dollars advanced towards the payment of the execution was afterwards repaid from the insurance money; and under the views above stated as to the complainant's relation to the equitable lien of the defendants, it is unnecessary to consider the status of this amount in regard to security and priority. But the ten thousand dollars subsequently advanced, for which the complainant seeks to sustain her lien, embraced a sum in excess of the amount of the Adams decree, and as to this sum further examination is necessary.

The execution was a lien superior to the defendants' security. It was paid before levy because of the arrangements entered into by the complainant with the Valido Marble Company and with Adams. It was understood that the complainant should

advance money sufficient to redeem the property from both liens, and hold the property as security for the entire disbursement. The two liens amounted to more than the sums advanced. The mortgage indebtedness was not paid until after the decree of foreclosure had become absolute. The defendants, having taken their conveyance while the proceedings were pending, were bound by the decree. 2 Jones Mortg. s. 1411. *Kopper* v. *Dyer*, 59 Vt. 477, 489. But for the complainant's understanding with Adams, the defendants would thus have lost all hold upon the property. No other right can have been left them than a right to compel the complainant to carry out her arrangement with Adams and the company, and recover the title. But she could not be compelled to carry out the arrangement without having the full benefit for which she had stipulated—security for both the sums advanced. She completed the payment to Adams as agreed, and obtained the title thereby, and afterwards conveyed the property to the company, conditioned upon the payment of the sums advanced. The defendants must now stand upon this conveyance; but they cannot stand upon it without recognizing the complainant's right to a repayment of the sums advanced for the satisfaction of prior securities under the agreement by which she procured the title.

The complainant is entitled to a decree in accordance with the foregoing views, unless the findings of the master are vitiated by the consideration of improper evidence received against objection.

The testimony of the complainant's husband was received as to transactions in which he was not her agent; and if objection was made upon that ground its admission was improper. It is insisted that the first objection noted to the husband's testimony was an objection of this character. We think it cannot upon any fair construction be so held. The complainant claimed to have dealt with the witness as the general manager of the Valido Marble Company, and the objection was evidently directed

against any proof of his acts in behalf of the company without proof of his authority. The probability that an objection to the husband's competency would be made is perhaps the strongest argument in favor of the claim that this was intended to be such. But the defendants, for obvious reasons, wished to stand, and were standing, upon the ground that the complainant's husband was her agent in all matters; and the course of the objections as set forth in the exceptions reported fairly indicate that counsel proposed to assume that the fact of his general agency was already established by an expression to that effect in the complainant's own testimony. This affords an explanation of what might otherwise be considered an incomprehensible oversight on the part of counsel.

Johnson's testimony that the money drawn from the bank was used for the benefit of the company was properly received. A check may be the best evidence of its contents; but the expenditure of its avails may be shown without producing or accounting for it. The question here was not, to whom was the check made payable, but for whom was the money expended. The check might have been payable to Johnson personally, and yet the funds have been used for the company.

Johnson was the treasurer and general manager of the company, but the defendants claimed that in receiving the insurance checks from his wife he was acting as her agent. It was therefore proper for the complainant to meet this claim with the testimony of Johnson that he received the checks as the treasurer and agent of the company. Defendants' counsel cite *Farmers etc. Bank* v. *Champlain Transportation Co.* 23 Vt. 206, in support of their objection to this evidence. But the two cases are not alike. There it was sought to charge the person to whom the package was delivered with having received it in a certain capacity, by evidence of the mental purpose of the person who deliv-

ered it, in no way expressed or made known to the other. Here the person receiving the checks testified to the capacity in which he received them; and there being evidence of a previous arrangement for the delivery of the checks for a certain purpose, his testimony was no more than that he received the checks in accordance with that arrangement.

Decree reversed and cause remanded with mandate.

CHITTENDEN COUNTY,

JANUARY TERM, 1892.

PRESENT: TAFT, ROWELL, TYLER AND MUNSON, JJ.

STATE *v.* THOMAS BAKER.

Perjury. Form of indictment. No. 29, Acts 1890.

The form prescribed in s. 3, No. 29, Acts of 1890, is properly used in an indictment charging the commission of perjury in disclosure proceedings before a justice of the peace after a conviction for intoxication.

Indictment for perjury. Trial by jury at the September term, 1891, Ross, Ch. J., presiding. Verdict of guilty. The respondent excepts.

The form of the indictment was that prescribed by s. 3, No. 29, Acts 1890. The evidence of the State tended to show that the respondent had been convicted of the crime of intoxication before a justice of the peace, and had thereupon been required to disclose before said justice the source whence he obtained the intoxicating liquor; and that in the making of such disclosure he committed the alleged perjury. To the admission of this evidence the respondent objected and excepted.

D. J. Foster, for the respondent.

At common law no fact could be proved in a criminal prosecution which was not alleged in the indictment. 1 Bish. Cr. Pro. 331, 339.

The legislature may simplify an indictment, but cannot do away with its essential requisites.

Con. of Vt. Chap. 1, Art. 10; Cooley's Con. Lim. 294, 374, 327, Note.

J. E. Cushman, State's Attorney, and *W. L. Burnap*, for the State.

The opinion of the court was delivered by

TAFT, J. No question arises in this case as to the sufficiency of the indictment. There is neither demurrer nor motion in arrest. Objection was made that certain testimony was not "admissible under the indictment." It was admitted under exception and this is the only question before us. The testimony tended to support material allegations in the indictment and was therefore properly admitted unless the claim of the respondent is tenable, that the offence shown was committed before a court or tribunal and therefore the indictment should have been in the form prescribed in s. 1, No. 29, Acts 1890. The form given in s. 3, of that act is the one used by the pleader in the case at bar, and is the appropriate one, in any case when a person gives false testimony before any person who has authority to examine him under oath touching or concerning any matter or thing; and we think the same form should be used whether the false testimony is given before a court or tribunal, or elsewhere. When a witness testifies falsely, before a court or tribunal, in a trial between parties, the form given in s. 1, of the act, may be used, as it appropriately describes the offense. It is not necessary, however, to use that form in the prosecution of every offence committed before a court or tribunal. It is only appropriate in those cases when the acts constituting the offence fall within the legitimate scope of its substantial and material allegations; *i. e.* when a witness appears in a proceeding before a tribunal of competent jurisdiction, in which there are parties, and commits perjury in giving testimony which is material to the issue then and there pending in said proceeding. A disclosure proceeding following a conviction of the crime of intoxication is not a trial between parties. It may appertain to, and depend upon one, be an incident of one, but it is not a part of it. The third section of the act covers a case of perjury committed before a "person or persons or before a board consisting of more than one person." It is claimed that the form given in that section

cannot be used if the oath was taken before a court. The words of the section are general, they are "before a person or persons or a board consisting of more than one person" etc. Why may not a court or the judge or judges composing it be described as a person or persons? The word "person" as used in that section includes any and every one, whatever his official position may be, or, in whatever official capacity he may act. A person as such has no right to examine another under oath. It must always be in some official capacity. The word "person" is used in the third section, to include any official or magistrate, to whom power is given to conduct judicial or other investigations. Judges of a court are persons, and the act no doubt was so drawn, using such a general term, as to include all persons having authority to examine others, to avoid the necessity of naming each particular official. There are many instances of the power of courts to examine persons, not as witnesses, but as to matters of which it is supposed they may have knowledge *e. g.* these very cases of disclosure by intoxicated persons; in the probate court when a person is suspected of concealing the property or papers of the estates, or the wills of deceased persons, or the property of those under guardianship under R. L. ss. 2157, 2158, 2455; in the same courts and courts of insolvency in the settlement of accounts. The respondent was properly charged with having testified falsely before a person, one J. W. Russell, justice of the peace, then and there having authority to examine him under oath touching or concerning the matter of the place where and the person of whom he procured the liquor causing his intoxication, and we think although the procceding of the disclosure was in court, he was properly prosecuted under the form given in the third section of the act referred to. The testimony was properly admitted.

Exceptions overruled, judgment of guilty upon the verdict affirmed, sentence thereon and execution thereof ordered.

GEORGE DENO *v.* HARRY THOMAS.

Trustee process impounds goods in hands of trustee. Liability of defendant for removing same. Damages. Judgment by default.

1. The service of trustee process impounds in the hands of the trustee, to await the determination of the suit, the property of the defendant subject to trustee process which is then lawfully in the possession of the trustee.
2. If the defendant takes such property from the possession of the trustee he is liable in nominal damages at least.
3. And he is liable in actual damages to the amount of a judgment obtained against and paid by the trustee in the trustee suit, not exceeding the value of the property.
4. Nor is it material that the trustee suffers this judgment by default, provided he would have been held chargeable had he appeared and disclosed.

Trover for the conversion of a horse. Plea, the general issue. Trial by jury at the September term, 1891, Ross, Ch. J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The case appears in the opinion.

J. A. Brown and *Seneca Haselton*, for the defendant.

The plaintiff having been defaulted in the trustee suit, was never adjudged liable in respect of this horse. The judgment against him was a money judgment. Hence the incohate lien created by the service of the trustee process was never perfected and the plaintiff cannot have the benefit of it. R. L. s. 1111; *Bartlett* v. *Wood*, 32 Vt. 372; *Wilder* v. *Weatherhead*, 32 Vt. 765; *Holmes* v. *Clark*, 46 Vt. 22; *Parker* v. *Wilson*, 61 Vt. 116.

George Deno *v.* Harry Thomas.

H. F. Wolcott and *A. V. Spaulding*, for the plaintiff.

The opinion of the court was delivered by

TAFT, J. The plaintiff had the defendant's horse on trial, under a supposed contract of purchase. Before the time of trial expired, the plaintiff was summoned as trustee in a suit against the defendant, brought by one Blodgett. At the expiration of the time of trial the defendant, against the protest of the plaintiff, took the horse away, a controversy having arisen between them as to the terms of the contract, the plaintiff claiming the price agreed upon was fifty dollars, the defendant that it was sixty. The defendant knew of the trustee suit at the time he took the horse, and that the plaintiff objected to his taking it for that reason. The defendant had no right, at the time, to take the horse, as it was lawfully impounded in the plaintiff's hands to await the termination of the trustee suit, and is liable for nominal damages in any event, as the legal right of the plaintiff was invaded. Is he liable for the value of the animal? The jury found that the plaintiff did not purchase the horse. In the trustee suit the defendant and the plaintiff, as his trustee, were defaulted and the plaintiff adjudged liable as trustee in the amount of the judgment, fifty-three and 1-100 dollars, which he paid. The jury found the latter sum to have been the value of the horse. The defendant does not contend but that if the plaintiff had appeared in the trustee suit, and disclosed that, at the time of the service of the trustee writ, he had the horse in his possession, he would have been adjudged chargeable in respect of the specific property, under R. L. s. 1111, and then we think it must be conceded that the defendant would be liable in this suit for the value of the horse. Had the plaintiff been held under said section, it would have been his duty, under R. L. s 1119, to deliver the horse to the officer holding the execution, that it might be sold thereon, and by so doing relieve himself from liability in the trustee suit. But the act of the defendant in taking the horse from the plaintiff had made it impossible for the latter to

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the power of complying with the statute which required him to deliver the horse to the officer. As between these parties the law did not require the plaintiff to do an act which had been rendered futile by the conduct of the defendant. The rights of third parties are not in question, and as against this defendant, we think the plaintiff could elect either to disclose or be defaulted. The case is analogus in principal to that of King who sued Ham in trover for a promissory note. After the maker, who could and would have paid, had King had the note, became insolvent, Ham offered to return it, but the court in (*King* v. *Ham*) 6 Allen 298, held the defendant liable for its value at the time of the conversion, and rightly so, as Ham had by his wrongful act prevented King from collecting it. So in this case, the direct result of the defendant's act was an injury to the plaintiff in that it prevented him from delivering the horse to the officer holding the execution. A disclosure in the case was useless. Lumpkin, J., in 26 Ga. 30, says, "After all where lies the justice of the case? I always dig deep for that, and when found, nothing but imperious legal necessity can prevent me from enforcing it." In this case deep digging is not required to discover that it is just to compel the defendant to pay his own debt and not saddle it upon the plaintiff, and we know of no legal rule that stands in the way of enforcing such even-handed justice. The charge of the court was correct and the

Judgment affirmed.

Rowell, J., dissents, and would hold the plaintiff entitled to nominal damages only.

M. H. ALEXANDER *v.* JOHN HANLEY.

Statute of limitations. Note witnessed by wife of payee.

If a promissory note be attested by the wife of the payee as a witness with the knowledge and consent of the maker, he cannot afterwards object that the same is not a witnessed note within the statute of limitations.

Exceptions from the City Court of Burlington.

The action was special assumpsit for the amount of a promissory note. Plea, the statute of limitations. Replication that the note was a witnessed note. Trial by court.

The note was payable to Edward P. Howe and was attested by Elizabeth A. Howe as a witness. It was conceded that Elizabeth A. Howe was the wife of Edward P. Howe. The court found that the defendant executed the note in the presence of the said Elizabeth A. and that she subscribed the same as a witness with his knowledge and consent; and upon these facts sustained the replication and gave judgment for the plaintiff. To the action of the court in holding that Elizabeth A. was a competent attesting witness the defendant excepted.

J. J. Monahan, for the defendant.

The wife was incompetent as an attesting witness, since she could not have been a witness in court to the execution of the note. *Carpenter Exr.* v. *Moore et al.*, 43 Vt. 395; *Harding* v. *Cragie*, 8 Vt. 208; *Simkins* v. *Eddie*, 56 Vt. 615; *Wells* v. *Tucker*, 57 Vt. 228; *Carr* v. *Cornell*, 4 Vt. 118; *Esterbrook* v. *Prentiss*, 34 Vt. 459; *Morrill* v. *Morrill*, 53 Vt. 78; *Tillotson* v. *Prichard*, 60 Vt. 107; 1 Greenl. Ev. (12 Ed.) 572.

M. H. Alexander, for the plaintiff.

An attesting witness is not necessarily a competent witness. R. L. ss. 961, 2042; Edn. Interp. St. Note p. 28; *Smith* v. *Cham-*

berlin, 2 N. H. 440; *Johnson* v. *Turner*, 7 Ohio 216; *Morrill* v. *Morrill*, 53 Vt. 74.

The opinion of the court was delivered by

TAFT, J. The consent of the defendant, with full knowledge of the situation, that the wife might witness the note, made her competent to do so, and he cannot now be permitted to take this objection. The judgment of the City Court was correct and the same is

Affirmed.

TOWN OF JERICHO *v.* TOWN OF UNDERHILL.

Jurisdiction. Interest of justice. Judgment upon plea in abatement.

1. The plaintiff, defendant and three other towns unite in the common maintenance of a poor farm upon which the paupers of the several towns are supported. The terms of the association provide that in case of a deficit, it shall be borne by the several towns in proportion to the number of weeks during which their paupers have been supported. *Held*, that a third town had no interest in the event of a suit brought by the plaintiff to recover of the defendant the amount of an assessment paid to the association by the plaintiff for the support, upon this farm, of a pauper legally chargeable to the defendant.

2. Where an issue of fact raised by a plea in abatement is found in favor of the plaintiff, judgment in chief should follow; and the Supreme Court, upon sustaining the exceptions of the plaintiff, will give such judgment as the County Court should have given and remand the cause for the assessment of damages.

This was an action under the statute to recover the expense of supporting a transient pauper chargeable to the defendant. The defendant filed a plea in abatement, which the plaintiff trav-

ersed. Heard upon this issue at the April term, 1891, Thompson, J., presiding. Upon the facts found by the court, the court gave judgment, *pro forma*, sustaining the plea and dismissing the suit. The plaintiff excepts.

It appeared that the plaintiff, defendant and three other towns formed an association for the purpose of supporting their poor upon a common poor farm, under conditions which are fully set forth in the opinion. In case the expenses of this farm exceeded the receipts, the several towns were to bear this deficit in proportion to the number of weeks that their paupers had been maintained upon the farm, that is, each town was to pay so much a week for each pauper which it had there.

The plaintiff's declaration alleged that the pauper in question was a transient legally chargeable to the defendant, in whose support the plaintiff had incurred expense which the defendant was liable to repay.

The plea of the defendant in abatement set forth that the expense incurred by the plaintiff was by way of payment to the association for the support of the pauper upon the common farm; that the town of Essex was one of the members of this association, and so interested in the event of this suit; and that the justice of the peace before whom the suit was brought was a resident and tax-payer in Essex and hence disqualified. These facts were found by the court substantially as laid in the plea.

M. H. Alexander and *Seneca Haselton*, for the plaintiff.

The town of Essex had no such direct financial interest as would disqualify the justice. *Gray* v. *Middletown*, 56 Vt. 53 and cases there cited; *Fletcher* v. *Rd. Co.*, 74 Me. 434; *Comr. of Cleremont Co.* v. *Lytle*, 3 Ohio 290; *M. E. Church* v. *Wood*, 5 Ohio 283; G. S. Chap. 31, s. 22.

J. J. Monahan and *V. A. Bullard*, for the defendant.

These towns were partners as to the support of the pauper for which a recovery is sought, and hence the town of Essex is

interested in the suit, and the justice disqualified. *Chandler* v. *Richer*, 49 Vt. 128, 130, 131; R. L. s. 692; *Waters* v. *Day*, 10 Vt. 489.

The opinion of the court was delivered by

ROWELL, J. Five towns, of which Jericho and Essex are two, associated under the name of the Union Poor Farm Association, for the support of their poor; but whether they associated under the statute in such case made and provided does not appear, and is not material in the view we take of the case.

For the purposes of the association, the towns composing it have all along owned a farm and personal property as tenants in common, having an interest therein in unequal proportions, as spccified in the constitution of the association, which provides that on disbandment and sale of the property, the proceeds shall be divided among the towns on the basis of their respective interests in the property. It also provides that if the expenses of running the association and supporting the poor are in excess of the receipts, the deficit shall be assessed upon and paid by the several towns annually in proportion to the number of weeks each town has had paupers supported by the association during the year; and that any surplus above expenses shall be divided among the towns on the basis of the capital stock owned by each in the association. The by-laws provide for the keeping of fair books of entry of all receipts and disbursements of the association, and for a report thereof to the several towns on or before the first day of March in each year, together with the names and number of paupers kept by the association, the towns they were from, and the number of weeks each town had paupers supported during the year.

For the year covering the time laid in the declaration, there was a deficit of $614.05, which was apportioned among the towns on the basis of 88 6-10 cents per week for each pauper; and after this suit was brought, but before it was tried before the justice,

Jericho paid the association at that rate per week for keeping this pauper.

If Essex is interested in the event of this suit, it is because of being a member of said association and not otherwise. The plea alleges that Essex is thus interested because this pauper, during the time in question, was supported at said farm at the joint expense of the towns to the extent of the receipts of the farm, which were $755.14 for the year ending Feb. 5, 1891. It is not being claimed that the pauper was supported at the joint expense of the towns as to the deficit of that year, the only question is whether it appears that she was so supported at their joint expense to the extent of the receipts and products of the farm, as alleged.

The case does not show any specific provision by the towns, nor any finding of fact by the court, as to how the matter of the expenditure and consumption of such receipts and products is to be adjusted among the towns, but the whole tenor of the record is, that it is to be adjusted on the basis of giving to each town the benefit of its full share of the property. This, being equality, would be equity; and in the absence of anything to show the contrary, and in view of what appears, this must be taken to be the way it is. Indeed there is nothing in the record that tends to support the allegation of the plea that this pauper was supported at the joint expense of the towns to the extent of the receipts of the farm. To say this, would be to suppose that the receipts and products are used indiscriminately for the support of paupers, with no accounting to be had among the towns in respect thereof, which is not probable.

Thus it appears that each town is to pay the association in full for keeping its paupers, and that no town is to be at any expense for keeping the paupers of another town. It follows, therefore, that the association, and consequently Essex, never had any interest in the event of this suit; not in a recovery, for a recovery would not affect their interests; not in a defeat, for if we were

to suppose a defeat to result in compelling Jericho further to support the pauper, it would make no difference to the association, for if it should again support the pauper for Jericho, the town would have to pay for it the same as before.

The result is, we hold that the justice was never interested in the event of this suit by reason of being a resident tax-payer of Essex.

As the facts found by the County Court and certified up determined for the plaintiff the issue joined on the plea in abatement, that court should have rendered judgment in chief for the plaintiff and assessed the damages. *Peach* v. *Mills*, 13 Vt. 501; *Vanderburg* v. *Clark*, 22 Vt. 185; *Good* v. *Lehan*, 8 Cush. 301; Gould's Pl. 300; 2 Greenl. Ev. s. 27; 3 Saund. 211, n. (3).

It is the duty of this court to render such judgment as the County Court should have rendered; therefore,

Judgment reversed, judgment for the plaintiff, and cause remanded for the assessment of damages.

Taft, J., being a taxpayer in Williston, did not sit.

BYRON A. AUSTIN *v.* BAILEY & PUTNAM ET AL.

Chattel Mortgage. Giving of new note and mortgage. Sale upon second mortgage.

1. A mortgage lien upon personal property is not discharged by the giving of a new note in substitution for the original one, although an additional claim is included in the new note.
2. Nor by the giving of a new mortgage upon the same property to secure the new note.
3. And as to one holding a lien intermediate between the first and second mortgages, the first mortgage would not be discharged by a foreclosure sale of the property upon the second mortgage, where the property was bought by and is in the possession of the mortgagees, so that redemption may be made from them.
4. This court will not presume that the County Court made any inference from the facts found upon trial by it, which was not warranted by such facts.

Trover for the conversion of a horse. Plea, the general issue with notice of special matter. Trial by court at the September term, 1891, Ross, Ch. J., presiding. Judgment for the plaintiff. The defendants except.

The facts appear in the opinion.

L. F. Wilbur, for the defendants.

Registration of the defendants' mortgage was notice to the plaintiff when his lien was created. *Passumpsic S. Bank* v. *Nat'l Bank*, 53 Vt. 82; Wade, Notice, ss. 41, 77, 37; Story Eq. Jur. s. 399; *McGgee* v. *Edwards*, 87 Tenn. 506.

The taking of a new note and mortgage to secure the same indebtedness did not extinguish the first mortgage lien. 15 Am. and Eng. Enc. of Law, 870, 871; *Bunker* v. *Barron*, 3 N. Eng. Rep. 597; *Orvis* v. *Newell*, 17 Con. 96; *Dana* and *Haydan* v.

Binney and *Morrison*, 7 Vt. 493; *Seymour* v. *Darrow*, 31 Vt. 129; *Thomas* v. *Gregory*, 20 Wend. 17; *Davis* v. *Maynard*, 9 Mass. 242; *Butts* v. *Dean, Admr.*, 2 Met. 76; *Hill* v. *Beebe*, 13 N. Y. 556; *Tucker* v. *Drake*, 11 Allen, 145; *Grimes* v. *Kimball*, 3 Allen, 518, 522.

At best the plaintiff has but a right of redemption against the defendants and this equitable title he cannot enforce by a suit at law. Jones Chat. Mort. s. 435; *Landon* v. *Emons*, 97 Mass. 37; *Holmes* v. *Bell*, 3 Cush. 322; *Burdick* v. *Mc Vanner*, 2 Denio 170; *Goodrich* v. *Willard*, 2 Gray 203.

The defendants still have the right to sell the colt under the first mortgage. *Calkings* v. *Clement*, 54 Vt. 635; *Denio* v. *Nash*, 60 Vt. 334; 3 Am. and Eng. Enc. Law, 201; *Bradley* v. *Redmond*, 42 Iowa 454.

Seneca Haselton, for the plaintiff.

That the first mortgage was extinguished must have been assumed by the County Court in rendering judgment for the plaintiff, and this court will presume the County Court to have found a fact, which is inferable from the facts found, and without which its judgment could not have been given. *Burton* v. *Est. of Barlow*, 55 Vt. 434; *Pattee* v. *Pelton*, 48 Vt. 182, *Seward* v. *Heflin*, 20 Vt. 144; *Brattleboro* v. *Reed*, 40 Vt. 76; *Harriman* v. *School District*, 35 Vt. 311; *Smith* v. *Day*, 23 Vt. 656; *Bradstreet* v. *Bank of Royalton*, 42 Vt. 128; *National Bank* v. *Strait*, 58 Vt. 448; *Kimball* v. *Estate of Baxter*, 27 Vt. 628.

The facts found by the County Court raise a presumption that the first mortgage lien has been discharged by the giving of the new note and mortgage. *Dana v. Bailey*, 7 Vt. 493; *Dunshee* v. *Parmalee*, 16 Vt. 630; *Trust Co.* v. *Farrar*, 53 Vt. 542.

The opinion of the court was delivered by

ROWELL, J. On November 16, 1889, Malaney, owning the colt in question, mortgaged it to the defendants Bailey and

Putnam, to secure his promissory note of that date for $75, payable the next day, and the mortgage was recorded on the day of its date. After the note matured, said defendants put the mortgage, but not the note, into the hands of the defendant Wheeler, a deputy sheriff, to foreclose. But they soon told him to proceed no farther, as there was a virtual agreement to settle the matter; and he did not proceed, but the mortgage remained in his hands.

On February 23, 1890, Malaney gave Bailey and Putman another mortgage of the colt, to secure his certain other promissory note for $115, executed that day, but antedated November 17th aforesaid, payable on or before September 16, 1890, in equal monthly instalments, commencing February 15, 1890. This note was given for the 75-dollar note secured by the first mortgage and $40 that Bailey and Putnam had paid to a third person for keeping the colt, and who had a lien on it therefor superior to their first mortgage.

When the second note and mortgage were given, the first note was given up, but the first mortgage was not discharged, and has not since been, and there is no express finding that the parties thereto intended it should be discharged by the giving of the new note and mortgage.

On January 23, 1890, which was between the giving of said mortgages, Malaney hired the plaintiff to keep and break the colt at five dollars per week; and the plaintiff kept it eight weeks under that agreement, and until March 19, 1890, when the defendant Wheeler, who was proceeding by the direction of the other defendants to foreclose the second mortgage, took it from the plaintiff's possession against his protest and claim of lien, and sold it on that mortgage to the other defendants for $55, leaving a balance due and unpaid of $53.80. It does not appear that Bailey and Putnam knew when they took the second mortgage and gave up the old note that Malaney had hired the plaintiff to

keep and break the colt. But the plaintiff is charged with notice of the first mortgage, for it was on record.

The plaintiff claims that from the facts found and certified up there arises a legal presumption that the parties intended that the second note and mortgage should operate as payment of the first note and a discharge of the first mortgage; but if not, that this court should presume, if necessary to uphold the judgment, that the County Court inferred such intention from the facts found; that in the circumstances, the taking of the second note and mortgage was an abandonment of the first mortgage; but if not, that by taking and selling the colt on the second mortgage, the defendants are estopped to set up the first mortgage, as the plaintiff's position in the premises was taken with reference to the defendant's position therein.

But the taking of a new note in substitution for one secured by mortgage, does not extinguish the debt evidenced by the latter so as to discharge the mortgage, unless such was the intention of the parties, shown by something besides what arises from the mere act of substitution; and the reason is, that the mortgage secures the debt, not merely the evidence of it, and as a change in the evidence does not pay the debt, the lien of the mortgage is not affected by it. *Dana & Hayden* v. *Binney & Morrison*, 7 Vt. 493; *Seymour* v. *Darrow*, 31 Vt. 122.

Nor does the taking of a second mortgage on the same property to secure the substituted note, operate to discharge the first mortgage, unless such was the intention of the parties. 2 Jones, Mort. s. 279; *Hill* v. *Beebe*, 13 N. Y. 556; *Hutchinson* v. *Swartsweller*, 31 N. J. Eq. 205; *Packard* v. *Kingman*, 11 Iowa, 219; *Gregory* v. *Thomas*, 20 Wend. 17. Nor the inclusion of an additional demand in the substituted note. That may serve to show the purpose of the transaction, but it does not show an intention to discharge the prior mortgage. *Hill* v. *Beebe*, 13 N. Y. 556; 2 Jones, Mort. ss. 927, 930. In this case the additional de-

mand did not increase the amount of the lien on the colt, for it was already a lien upon it.

It follows, therefore, that the taking of the new note and mortgage was not in law a discharge nor an abandonment of the first mortgage. Nor by taking and selling the colt on the second mortgage are the defendants estopped to set up the first mortgage, for the plaintiff's position in the premises could not have been taken, as claimed, with reference to the action, for whatever he did was done before that.

But although there is no estoppel, it is necessary to consider whether such taking and sale were effective as matter of law to discharge the lien of the first mortgage by withdrawing the property from its operation. It is undoubtedly true that for most purposes the foreclosure of a mortgage by sale exhausts the lien of the mortgage foreclosed, and severs the connection between it and the property mortgaged. But this is not true as to subsequent incumbrancers who have a right to redeem. They must redeem from the mortgage and cannot redeem from the sale. *Bradley* v. *Snyder*, 14 Ill. 263; (58 Am. Dec. 564, and note.) In this case, without saying how it would be if the facts were otherwise, the property having been purchased by the mortgagees, and, for aught that appears, being still in their possession, the plaintiff's right to redeem from the first mortgage was not affected by the foreclosure of the second mortgage, and as to him such foreclosure was not effective as matter of law to discharge the lien of the first mortgage by withdrawing the property from its operation; hence that mortgage may be set up against him notwithstanding such foreclosure.

As to presuming that the County Court inferred from the facts found that the parties intended to discharge the first mortgage—if indeed were we at liberty to thus presume in view of the statute requiring the facts on which the judgment was rendered to be reduced to writing and prohibiting other or different facts at issue from being incorporated into the exceptions—it is

sufficient to say that the facts found do not show that the County Court ought to have drawn such inference, as is shown by what has been said, and therefore we cannot presume that it did draw such inference. *Pratt* v. *Page*, 32 Vt. 13.

Judgment reversed and judgment for the defendants.

STATE *v.* E. H. WHITE.

Information may be amended. Intoxication.

1. At common law the body of an indictment cannot be amended, but an information may be even after plea filed.
2. The common law is in force in this State in that respect, notwithstanding that our statutes couple indictments with informations in permitting certain amendments.
3. In order that a person may be convicted of intoxication it is not necessary that he should drink the liquor for the purpose of becoming intoxicated.

Information for being found intoxicated. Plea, not guilty. Trial by jury at the April term, 1891, Thompson, J., presiding. Verdict, guilty. Exceptions by the respondent.

The case appears in the opinion.

V. A. Bullard, for the respondent.

At common law the information was insufficient. *McLane* v. *State*, 4 Ga. 335; *Hatwood* v. *State*, 18 Ind. 492.

The court could not allow the amendment since it was one of substance. R. L. s. 3857; Bl. Com. Bk. 4, 306; Arch. Cr. Pl., 11, 14; 1 Bish. Cr. Law, s. 389.

J. E. Cushman, State's Attorney, for the State.

A motion to dismiss is addressed to the discretion of the County Court, and the action of that court is not revisable here.

Commonwealth v. *Eastman*, 1 Cush. 189; *Commonwealth* v. *Ryan*, 9 Gray 137; 1 Whart. Cr. Law, s. 519.

Informations are amendable. *State* v. *Murphy*, 55 Vt. 547.

The charge as to the intention of the respondent in becoming intoxicated was correct. *State* v. *Hopkins*, 56 Vt. 250, 260.

The opinion of the court was delivered by

ROWELL, J. After plea pleaded and jury sworn, the prisoner moved to dismiss the information, for that the time alleged therein as the day of the intoxication complained of was more than thirty days before the information was exhibited in court. Thirty days is the period of limitation for prosecuting the offence. The court overruled the motion and allowed the State to amend the information by changing the allegation of time from the 15th of April to the 30th of May, a time within the statutory period, and the day of the commission of the offence; and the question is, whether that amendment was allowable. We have not considered whether the amendment was necessary nor whether it was authorized by statute, but only whether it was authorized by the common law. No claim is made that it was out of time, but only that the court had no power to make it.

That the body of indictments cannot be amended at common law, is beyond doubt. *Ex Parte Bain*, 121 U. S. 1, and cases there cited. But there is a great difference between amending indictments and amending informations, and the reason is this, as stated by Lord *Mansfield* in the great case of *Rex* v. *Wilkes*, 4 Bur. at page 2569: "Indictments are found upon the oaths of a jury, and ought to be amended only by themselves; but informations are as declarations in the King's suit. An officer, of the Crown has the right of framing them originally, and may, with leave, amend in like manner as any plaintiff may do." In that case the prisoner, having been convicted by a jury of having printed and published a seditious and scandalous libel, was brought

up before the King's Bench on a motion for a new trial on account of amendments made in the body of the information on which he was tried. The amendments were made at Lord *Mansfield's* chambers after a plea of not guilty, and after the record was made up and sealed and the case ready for trial; and they consisted in changing the allegations that the libel contained matter "to the purport," etc., to allegations that it contained matter "to the tenor," etc. Numberless precedents were produced from the time of Queen *Elizabeth*, and all through the reigns of James II. and Charles II., and many side-bar rules, which showed that it was of course, because, it was said, if not of course, it would have been moved in court, as everything not of course is. Mr. *Justice Willes* said the amendments were justified by an uninterrupted series of precedents from the time of William III. at least. Lord *Mansfield* said that whether it was necessary to amend or not he gave no opinion nor formed any. In *The King* v. *Harris*, 1 Salk. 47, motion was made to amend an information of perjury, and opposed, because the defendant had pleaded. Holt, C. J., said: "As to mending after plea pleaded, there is no great matter in that. After a record has been sealed up I have known it amended, even just as it was going to be tried." Sir *Bartholomew Shower* moved to amend an formation of forgery in ten places, and though opposed the motion was granted by the King's Bench because it did not alter the fact, and that without costs or imparlance. *Anonymous* 1 Salk. 50. In *Rex* v. *Nixon*, 1 Stra. 185, the court refused to quash an information on motion that had been exhibited by rule of court, *Eyre*, J., observing that such informations are amendable. *Rex* v. *Charlesworth*, 2 Stra. 871, was an information for forging a warrant of attorney to acknowledge satisfaction upon a judgment of Easter Term. After issue joined, the record appearing to be of Hilary Term, the information was amended without costs (the prosecutor having been admitted a pauper) and without giving the defendant leave to plead *de novo;* and *Regina* v. *Simmonds*, Hil. 10 Anne, was cited, where the

title of an act set forth in an indictment was amended. Mr. Justice Yates says in *Rex* v. *Wilkes* that *Rex* v. *Charlesworth* is a very strong case, for without the amendment the defendant must have been acquitted. He also referred to *The King* v. *Goffe*, 1 Lev: 189, where it was moved to amend an information of perjury; and it was ruled that notice should be given to the defendant of the things to be amended, and he to show cause why it should not be amended, for, the court said, "it might be amended." In *The Queen* v. *Norton*, Fortes. 232, the court agreed that it is a general rule to amend informations at any time, even just before trial. Mr. *Chitty* says that informations, being the mere assertion of the officer who files them, may be amended at any time before trial, and that a mistake therein may be rectified either when a demurrer is actually put in or when it is expected, or after the defendant has pleaded in abatement; and that these alterations may be very extensive and material, even to the striking out or the addition of new counts, and that the defendant will not always be allowed to plead *de novo*. 1 Chit. Crim. Law, [868]. And in *Attorney General* v. *Henderson*, 3 Anstruther, 714, on inquiry the practice was found to be that the Attorney General could at any time amend an information as of course, and therefore the court granted a motion to amend the information by adding another count.

We are not unmindful of our statutes of amendment, which couple informations and indictments as though they stand alike at common law in respect to amendments, and one of which allows amendments "except as to matters of substance," from which language some implication arises that the amendment of informations as to such matters is prohibited. But these statutes are remedial, passed with a view of obviating defects in the existing law, and of giving courts power to amend criminal pleadings where none was supposed to exist before; hence they are to be construed so as to effectuate their purpose, and as not tak-

ing away a common-law power unless such is their manifest intention, which we think it is not, and that the common-law power of amending informations remains in full force notwithstanding the statutes.

There was no error in refusing to charge that respondent's intoxication must have been produced by liquor drank with the intent of becoming and being found intoxicated, nor in the charge as given on that subject. *State* v. *Hopkins*, 56 Vt. 250, 260.

Exceptions not sustained, judgment on verdict, sentence passed, and execution thereof ordered.

In re LUCIUS IRISH.

Disclosure of one found intoxicated. R. L. s. 3816.

Where a person has been arrested and brought before a justice for being found so intoxicated as to disturb the public peace, and has been ordered to disclose without protest on his part, it is no objection to the legality of a subsequent commitment for an insufficient disclosure that the justice did not, before requiring the disclosure, announce that he had found that the respondent was so intoxicated as to disturb the public peace, if in fact he had made such finding.

Petition of *habeas corpus*, returnable before Taft, J., who found the facts as stated in the opinion and continued the case as to the legal questions involved to the January term, 1892, of the Chittenden county Supreme Court.

M. H. Alexander, for the relator.

The relator could not be compelled to disclose until it had been legally adjudged that he was found intoxicated, and of this fact there was no legal evidence before the court. *In re* Hardigan, 57 Vt. 100.

J. E. Cushman, State's Attorney, and *J. W. Russell*, for the State.

The justice actually found on proper evidence that the relator was "found intoxicated," and it is immaterial whether he announced this finding before requiring the disclosure. *In re* Hardigan, 57 Vt. 100; *in re* Powers, 25 Vt. 261.

The opinion of the court was delivered by

START, J. It appears that the relator was found in such a state of intoxication as to disturb and break the public peace, and that he was arrested by an officer and taken before a justice of the peace, as is authorized by s. 3844 of R. L. From the officer's return the justice adjudged that the relator was, at the time of his arrest, found in such a state of intoxication as to disturb and break the public peace, and, without making any announcement of his decision, and without objection on the part of the relator, ordered him to disclose where and the person of whom the liquor producing the intoxication was obtained, as is authorized by R. L. s. 3814. The disclosure of the relator not being satisfactory to the justice, he was committed to jail.

The relator claims that he was ordered to disclose the place where and the person of whom the liquor producing intoxication was obtained before it had been adjudged by the justice that he was, at the time of his arrest, found in such a state of intoxication as to break the public peace, and, that, for this reason, the imprisonment was illegal. This claim is not supported by the findings of fact. It is expressly found that the justice, from the evidence before him, adjudged that the relator was, at the time of his arrest, found in such a state of intoxication as to disturb and break the public peace. The justice having thus adjudged, he had jurisdiction to proceed and require the relator to disclose the place where and the person of whom the liquor producing the intoxication was obtained. *In re* Powers, 25 Vt. 261; *In re* Hardigan, 57 Vt. 100.

The justice having found the facts necessary to give him jurisdiction, it was immaterial whether he announced to the re-

lator his findings of facts before calling upon him to make disclosures. His failure to announce his findings did not deprive him of the jurisdiction acquired nor render the proceedings void. The fact that the relator was found so intoxicated as to disturb and break the public peace does not appear to have been controverted. The justice ordered him to disclose, and he proceeded to do so without objection. Under these circumstances, a formal announcement of the justice's finding upon the question of fact was unnecessary, and the order that the relator disclose may well be regarded as equivalent to an announcement that he had found the facts necessary to give him jurisdiction.

The relator is remanded to his former custody, and the petition is dismissed without costs.

FRANKLIN COUNTY,

JANUARY TERM, 1892.

PRESENT: ROSS, Ch. J., TAFT, START AND THOMPSON.

NOYES, FRENCH & FICKETT *v.* EDWARD J. PARKER.

Burden of proof. Instruction of court. Not bound to instruct upon immaterial issue. As to contradictory statements. Opinion as to weight of evidence. Waiver of exception. Motion in arrest.

1. The action being for the amount of an over-draft paid by the plaintiffs upon the draft of the defendant for certain butter, which the plaintiffs alleged had not been delivered to them, an instruction from the court that the plaintiffs' right of action depended upon whether the butter was delivered by the defendant, and that in making out their case the burden was upon the plaintiffs, sufficiently informs the jury that the plaintiffs must assume the burden of proving that the butter was not delivered.

2. It was not error for the court to refuse an instruction that there was no evidence of fraud upon the part of the defendant, inasmuch as the question of fraud was in no way an issue in the case.

3. Nor to refuse the instruction that "testimony tending to show that a witness had made statements out of court that contradict his testimony in court, is to be weighed with caution."

4. The court is not bound to express an opinion as to the weight of evidence, nor is that the usual or better practice, although it may be done in such a way as not to be reversible error.

Noyes, French & Fickett *v.* Edward J. Parker.

5. By introducing evidence upon his part, the defendant waives an exception to the action of the court in overruling his motion for a verdict made at the close of the plaintiffs' case.

6. A motion in arrest of judgment must be heard and determined upon the record alone; and the error so appearing must be such as would render the judgment erroneous notwithstanding the verdict.

Assumpsit. Plea, the general issue. Trial by jury at the September term, 1891, Tyler, J., presiding. Verdict and judgment for the plaintiffs. The defendant excepts.

The case appears in the opinion.

H. C. Adams, for the defendant.

The court should have instructed the jury that evidence of contradictory statements made out of court should be weighed with caution. 1 Greenl. Ev. s. 200, p. 237; *Malin* v. *Malin*, 1 Wend. 652; *Cleveland* v. *Burton*, 11 Vt. 138.

Ballard & Burleson, for the plaintiffs.

The opinion of the court was delivered by

THOMPSON, J. The defendant contends that the burden of proof was on the plaintiffs to prove that the defendant did not deliver the thirty tubs of butter either on the cars or at the railroad station, whichever the jury found the place of delivery to be, and that the court below neglected to so charge the jury. Without deciding on which party this burden rested, we think the court instructed the jury that this burden was on the plaintiffs. Some time prior to June 13, 1889, the parties made a contract by which the defendant was to sell and deliver to the plaintiffs at Georgia, Vt., either on the cars as claimed by the plaintiffs, or at the railroad station, as claimed by the defendant, two hundred tubs of butter of fifty pounds each at nineteen cents a pound. It was conceded that some time between that date and the 13th day of June, the defendant delivered to the plaintiffs one hundred and seventy tubs of butter and some cheese, and that on the last named date he drew upon the plaintiffs through the Howard

National Bank, Burlington, Vt., for $1,900, which draft was honored and paid by the plaintiffs. The defendant's evidence tended to show that he delivered the remaining thirty tubs of butter to the plaintiffs pursuant to his contract, before he drew the draft, while, on the other hand, the evidence of the plaintiffs tended to prove that he never delivered the thirty tubs of butter, and that consequently, there was an over-draft of $285. This action was brought to recover this alleged over-draft. In stating to the jury the case as made by the plaintiffs, the Court said: "The plaintiffs claim that $285 of the $1,900 was over-draft: that it was for thirty tubs of butter which they claim the defendant never delivered, and which they say they never received. If that is true, the defendant received $285 that did not belong to him, and the law implies a promise on his part to repay it." Thus the Court clearly stated to the jury that the plaintiff's right of recovery rested upon an implied promise which the law only raised in case the defendant had not delivered the thirty tubs of butter. The Court then stated to the jury the respective claims of the defendant and plaintiffs in regard to the delivery and non-delivery of the butter, and in connection therewith said: "The issue in this case is whether or not the defendant delivered the thirty tubs of butter. The plaintiffs having brought their suit; the law casts upon them the burden of making out their case by a fair preponderance of the evidence. There is no technical meaning to the term preponderance of the evidence; it simply means that the burden is cast upon them to support their claim by a greater weight of evidence than the evidence adduced against their claim by the defendant; that is, the evidence produced by the plaintiffs must in your judgment weigh at least a little more than the evidence produced by the defendant against that claim. If the evidence, in your judgment, is just evenly balanced, the plaintiffs would not be entitled to recover. Their evidence must weigh a little more at least than the evidence on the part of the defendant. Then, with this rule in mind,

this is the question for you to determine in this case and find your verdict accordingly,—was there a delivery by the defendant of these thirty tubs of butter according to the contract between himself and the plaintiffs?" The jury were thus clearly and specifically instructed that in order to entitle the plaintiffs to recover, they must find that the weight of evidence was in favor of the plaintiffs' claim that the thirty tubs of butter were not delivered. This exception cannot, therefore, avail the defendant.

II. It was not error for the Court to refuse to instruct the jury that there was no evidence in the case tending to show fraud on the part of the defendant. The plaintiffs did not put their right of recovery on the ground of fraud on the part of the defendant. The sole question was whether or not the defendant delivered the thirty tubs of butter according to the terms of his contract. If he had not delivered the butter, the plaintiffs were entitled to recover. If he had delivered it, the plaintiffs were not entitled to recover, although they never received it.

III. The defendant was not entitled to have the Court comply with his request to instruct the jury that "testimony tending to show that a witness has made statements out of court that contradict his testimony in court, is to be weighed with caution."

"The admissibility of evidence is a matter of *law*, but the weight or value of evidence is matter of *fact*." 1 Best Ev. (Wood's Ed.) s. 80, star page 101. The admissibility and rejection of evidence, and whether there is any evidence to go to the jury, are questions of law for the decision of the court; whether there is sufficient evidence, is for the jury. On the other hand, the decision of the facts in issue is the exclusive province of the jury. 1 Best Ev. (Wood's Ed.) s. 82, star pages 103–105. This principle is illustrated by evidence of dying declarations. It is for the Court to determine whether the declarations were made under such circumstances as to constitute

them legal evidence. When the evidence is admitted, its credibility is solely a question for the jury, who are at liberty to consider and weigh all the circumstances under which the declarations were made and to give them only such credit as on the whole they think they deserve. 1 Greenl. Ev. (12th Ed.) s. 160. This request required the court to state to the jury as a matter of law that a certain kind of testimony was to be weighed with caution. The law does not give this, nor any other kind of testimony, if believed by the jury to be true, any particular weight or lack of weight as compared with other testimony. While the court, in its discretion, may give certain cautionary instructions in regard to some kinds of testimony, in so doing, it "must be careful not to trench upon the exclusive province of the jury in determining the credibility of particular witnesses, or the degree of credit to be given to particular elements of the evidence. He may instruct them as to the *rule* but not as to the weight of the evidence; that is to say, he should not instruct them as to the relative weight of the testimony, or the credibility of the witnesses." 2 Thomp. Tr. s. 2420. In support of his contention, the defendant cites 1 Greenl. Ev. s. 200, in which the subject of verbal admissions is discussed. We do not think the learned author intended that section to be taken as a statement of a rule of law governing the weight to be given to evidence of verbal admissions. On the contrary, it is simply a philosophical discussion of the fact that such evidence is subject to much imperfection and mistake, consisting as it does in the mere repetition of oral statements, and for the reason that the party himself may either have been misinformed or not have expressed clearly his own meaning, or that the witness may have misunderstood him.

While it would have been proper for the court in its discretion to have called the attention of the jury to the infirmities which in fact often attend evidence of the alleged oral admissions of parties, or alleged contradictory statements of witnesses

out of court, yet being a matter of discretion, no exception lies to the failure of the court to give such cautionary instructions. *State* v. *Roe*, 12 Vt. 111; *Durgin* v. *Danville*, 47 Vt. 95; *Doon* v. *Ravey*, 49 Vt. 293.

If this request be construed to be a request for the Court to express its opinion to the jury as to the weight of the evidence in question, then the defendant's exception cannot avail him. As a general rule, the better practice is for the Court not to express any opinion to the jury upon the weight of evidence, and this is the usual course in a very large majority of cases in this State. It is not reversible error for the Court to express such an opinion if it still distinctly leaves the evidence to the jury to weigh and to draw such conclusions therefrom as are warranted by it, provided the language used by the Court in expressing its opinion, is not such as to mislead the jury in regard to their right to determine the weight to which it is entitled. Neither was it error for the Court to refuse to express such opinion. *Gordon* v. *Tabor*, 5 Vt. 103; *Vincent* v. *Stinehour*, 7 Vt. 62, (29 Am. Dec. 145); *Stevens* v. *Talcott*, 11 Vt. 25; *Gale* v. *Lincoln*, 11 Vt. 152; *State* v. *Roe*, 12 Vt. 111; *Yale* v. *Seely*, 15 Vt. 221; *Sawyer* v. *Phaley*, 33 Vt. 69; *Missisquoi Bank* v. *Evarts*, 45 Vt. 293; *Durgin* v. *Danville*, 47 Vt. 95; *Doon* v. *Ravey*, 49 Vt. 293; *Pettingill* v. *Elkins*, 50 Vt. 431; *Rowell* v. *Fuller*, 59 Vt. 688.

The court in substance told the jury that the statements made by the witness out of the court were not to be considered as evidence tending to prove or disprove any of the issues on trial, but that their effect was to detract from the weight which might otherwise be given to the evidence of the witness thus contradicted. It was left for the jury to find whether in fact the witness, Richards, had made contradictory statements out of court, and if it was found that he had, they were told that it was wholly in their "discretion to say how much it should bear upon his testimony given upon the stand, as contradicting or not con-

tradicting it." This was a fair statement of the law applicable to this phase of the case.

IV. When the plaintiffs rested, the defendant moved the Court to direct a verdict for him, which motion was overruled, and to this ruling the defendant excepted. By proceeding with the trial after this ruling of the Court, and introducing evidence in defence, the defendant waived this exception. To have availed himself of it, he should also have rested. *Driggs* v. *Burton*, 44 Vt. 124; *Blanchard* v. *Manahan*, 44 Vt. 246; *Latremouille* v. *Bennington & Rutland Ry. Co.*, 63 Vt. 336.

V. After verdict, the defendant filed a motion in arrest of judgment, which was overruled, and to this ruling he excepted. At common law, "judgment can never be arrested but for that which appears upon the record itself." *Pechey* v. *Harrison*, 1 Ld. Raym. 232, S. C. 1 Salk. 77; *Sutton* v. *Bishop*, 4 Burr. 2284, 2287. "Such a motion can only be made 'on account of some intrinsic defect apparent on the face of the record, which would render the judgment in the case erroneous.'" *State* v. *Carver*, 49 Me. 588, (77 Am. Dec. 275); *State* v. *Creight*, 1 Brevard 169, (2 Am. Dec. 656); *State* v. *John*, 8 Iredell's Law 330, (49 Am. Dec. 396); 1 Bouv. Law Dict. (14th Ed.) Article, Arrest of Judgment; 1 Rap. & Law. Law Dict. Article, Arrest of Judgment s. 2; 1 Blacks. Com. (Cooley's Ed.) Book III., star p. 394. In *Walker* v. *Sargeant*, 11 Vt. 329 the court say: "A motion in arrest can be sustained only for matter apparent of record, and such things as take place on trial must be placed on record by a bill of exceptions, allowed by the court, before notice can be taken thereof for reversing a judgment, for they would never be proper for a motion in arrest." In Blacks. Com. above cited, it is said: "And this is an invariable rule with regard to arrests of judgments upon matters of law, 'that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the

action or plea. * * * But the rule will not hold *e converso*, that everything that may be alleged as cause of demurrer will be good in arrest of judgment," for certain omissions and errors are aided by a verdict. 1 Rap. & Law. Law Dict. *supra*. The rule as to the defects that shall be cured by verdict is thus stated in note (1) to *Stennel* v. *Hogg*, 1 Saund. Rep. 228, (6th Ed. with notes by John Williams, Patterson and Edward Vaughn Williams): "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law: or, in the phrase often used upon the occasion, such defect is not *any jeofail* after verdict." Gould's Pl. Ch. 10, s. 13; 1 Chit. Pl. (14th Am. Ed.) 673 and note (1). "But where *no cause of action* is stated, the omission is not cured by verdict. For as no right of recovery was necessary to be *proved*, or could have been legally proved under such a declaration; there can be no ground for presuming that it was proved at the trial." Gould's Pl. Ch. 10, s. 13. The defendant has not pointed out any "intrinsic defect" apparent on the face of the record, which, under the rules of law as above stated, would render the judgment of the court below erroneous, and therefore this exception cannot avail him.

Judgment affirmed.

JOSEPH BALLARD *v.* OSCAR A. BURTON.

Consideration. Forbearance. Waiver of legal right. Certificate of deposit. One signing upon back prima facie maker. Evidence. Charge of Court. Immaterial issue.

1. The plaintiff held a certificate of deposit against a national bank of which the defendant was a director, and applied for payment upon the same. The bank then had funds sufficient for the payment of the certificate and was engaged in its regular business, but was in fact insolvent. The officers of the bank requested the plaintiff not to draw out his money upon the certificate but to leave it in the bank. To this the plaintiff consented upon condition, that the defendant would sign the certificate. Thereupon the old certificate was surrendered, the one in suit issued, signed by the defendant upon the back, and the plaintiff forebore to call for the money until the bank passed into the hands of a receiver. *Held*, that upon the above facts there was a good consideration for the defendant's promise.

2. It is immaterial that no definite time of forbearance was fixed, provided the plaintiff did in fact forbear a reasonable time.

3. Nor is the plaintiff's right of recovery affected by the fact that under the laws of the United States applicable to banks a payment to him at the time he called for his money would have been void as a preference, and might have been recovered by the assignee.

4. The waiver of a legal right upon request is a good consideration though the promissee loses nothing thereby.

5. No other demand or notice was required to charge the defendant as a maker than a return of the certificate properly endorsed to the receiver.

6. The plaintiff was properly allowed to testify that he would not have left his money in the bank had he not understood that the defendant was obligated to pay it.

7. It is not error to refuse a particular instruction, if the legal principle embodied in it, as applicable to the case on trial, is correctly stated in some other instruction.

8. By signing his name upon the back of the certificate the defendant became *prima facie* liable as a maker nor did the addition of the word "surety" alter that presumption.

9. The real obligation intended to be assumed by the defendant might be shown provided it was known to the plaintiff when he accepted the certificate.

10. Whether the defendant himself received any consideration is immaterial, and the submission of that issue to the jury was not error.

Special assumpsit upon a certificate of deposit. Plea, the general issue. Trial by jury at the September term, 1891, Tyler, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The certificate of deposit was as follows:

"No. 3483. First National Bank of St. Albans.
St. Albans, Vt., Jan. 14th, 1884.

I hereby certify that Joseph Ballard has this day deposited in this bank Nine Hundred Sixty-two dollars, payable to the order of himself on return of this certificate properly endorsed with interest at 4 per cent per annum.

(Signed) A. Sowles, Cashier."

(and on the back thereof)

"E. A. Sowles
A. Sowles
O. A. Burton, surety."

The facts sufficiently appear in the opinion.

Farrington & Post, and *Wilson & Hall*, for the defendant.

There was no consideration. Dan. Neg. Ins., s. 160; Chitty, Con. 69; *Rix* v. *Adams & Throop*, 9 Vt. 233; *Harding* v. *Cragie*, 8 Vt. 501; *Mecorney* v. *Stanley*, 8 Cush. 85; *Manter* v. *Churchill*, 127 Mass. 31.

Payment to the plaintiff, the bank being insolvent, would have been void, and might have been recovered by the receiver. Hence the plaintiff lost nothing by his forbearance. *First National Bank* v. *Colby*, 21 Wall. 609-616; cases cited in Bump

under s. 5428; *Roberts, Rec'r.*, v. *Hill, Admr.*, 24 Fed. Rep. 571.

The certificate never was returned according to its terms, so that no right of action ever matured to the plaintiff. *Brown* v. *McClary*, 52 Ind. 404.

H. C. Adams, and *Ballard & Burleson*, for the plaintiff.

The forbearance of the plaintiff to withdraw his money was a sufficient consideration. *Hakes, et al.* v *Hotchkiss*, 23 Vt. 231; *Seaman* v. *Seaman*, 12 Wend. 381.

The opinion of the court was delivered by

START, J. The defendant's motion for a verdict was properly overruled. It appears from testimony, not controverted, that the defendant was a stockholder and director of the First National Bank of St. Albans. The plaintiff and his sister had money deposited there, evidenced by certificates of deposit. There was a run on the bank, and the plaintiff presented these certificates and demanded the money evidenced by them. There was a sufficient amount of money at hand to pay the sums demanded; but the officers of the bank desired to retain it and asked the plaintiff to leave it. Thereupon he told them he would accept of a new certificate signed by the defendant, otherwise he wanted the money. They gave him such a certificate, and he surrendered up to the bank the old certificates. The plaintiff subsequently paid his sister the amount of her certificate, which was included in the new certificate. The cashier of the bank understood the plaintiff was to forbear for a reasonable time the exercise of his right to draw the money, and the plaintiff did forbear until the bank closed its doors and its funds went into the hands of a receiver. At this time the bank was insolvent. The evidence fails to show that a definite period of forbearance was agreed upon, but no question is made but that the plaintiff did forbear for a reasonable time.

The uncontroverted evidence clearly entitled the plaintiff to a holding by the court that there was a sufficient consideration for

the defendant's promise. The request by the officers of the bank that the plaintiff leave the money, his reply, the giving of a new certificate, the surrender of the old ones, and the forbearance of the plaintiff admit of but one interpretation. The plaintiff, in consideration of a new certificate signed by the defendant, surrendered the old certificates and agreed to, and did, forbear the exercise of a legal right to then draw his own and his sister's money. In view of the uncontroverted facts and circumstances in the case, any other construction of the contract would be meaningless. It is a rule in construing contracts that they are to be so understood as to have legal and actual operation, and a construction which would be senseless in view of the circumstances of the case, or wholly inapplicable, should never be adopted. Story on Contracts, sec. 640; *Atwood* v. *Cobb*, 16 Pick. 227; *Evans* v. *Sanders*, 8 Port. 497 (33 Am. Dec. 297.) Words are not to be construed in a frivolous or ineffectual sense when a contrary exposition can be given them; they should have a reasonable construction according to the intent of the parties. Chitty on Contracts, 79.

In *Gunnison* v. *Bancroft*, 11 Vt. 490, it is held that language used by one party to a contract, is to receive such a construction as he at the time supposed the other party would give to it, or such a construction as the other party was fairly justified in giving to it.

In *Judevine* v. *Goodrich*, 35 Vt. 19, where one, in reply to the request of another for a license to do something in respect to the former's property, did not intend to accede to the request, but purposely used language susceptible of a double interpretation in this respect, with the intention that the other party should derive the impression that he did accede to the request, and the other did derive such impression and relied on it, it was held that he was bound to the same extent as if he had, in express words, granted the license.

When the plaintiff said to the officers of the bank, in reply

to their request that he leave the money, that he would accept a new certificate signed by the defendant, otherwise he wanted his money, they had the right to understand him as offering to leave the money for a reasonable time if such a certificate were furnished. They accepted of his offer, furnished the certificate, he accepted of it, and forebore for a reasonable time the exercise of his right to draw the money. All parties seemed to have understood that such was his undertaking, and what was said and done admits of no other interpretation, and such will be deemed to have been the contract. It is insisted that the defendant's promise was without consideration because no time of forbearance was agreed upon. A promise to forbear and give further time for the payment of a debt, although no certain or definite time be named, if followed by an actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise to pay the debt by a person other than the debtor. *King* v. *Upton*, 4 Me. 387; *Elton* v. *Johnson*, 16 Conn. 253; *Howe* v. *Taggart*, 133 Mass. 284; *Prouty* v. *Wilson*, 123 Mass. 297; *Robinson* v. *Gould*, 11 Cush. 55; *Moore* v. *McKenney*, 83 Me. 80, (21 At. Rep. 749.)

In *Howe* v. *Taggart*, *supra*, Field, J., in delivering the opinion of the court, says: "It seems to have been assumed in this Commonwealth that an agreement to forbear bringing suit for a debt due, even although for an indefinite time, and even although it cannot be construed to be an agreement for perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise."

In *Moore* v. *McKenney*, *supra*, decided by the Supreme Court of Maine, in 1890, the defendant wrote his name upon the back of the note declared upon, intending thereby to guarantee its payment. He did this in consideration of the plaintiff's promise to forbear and give further time for the payment of the note; no time of forbearance was agreed upon, and it was held that the court properly ordered a verdict for the plaintiff. Wal-

ton, J., in delivering the opinion of the court, says: "If the promise is in general terms, no particular time being named, the law implies that the forbearance shall be for a reasonable time. Such is the legal construction of such a promise. The debtor, therefore, by such promise, does obtain a right not only to some delay but to a reasonable delay; such as under all the circumstances he is reasonably entitled to."

In *King* v. *Upton*, *supra*, the promise counted on was to pay the debt of another, in consideration that the creditor would "forbear and give further time for the payment of the debt," naming no time. The plaintiff averred that he did thereupon forbear, and the consideration was held sufficient.

In *Calkins* v. *Chandler*, 36 Mich. 320 (24 Am. Rep. 593), it is held that an agreement to pay the debt of another, in consideration that the creditor would forbear and give further time for payment, is founded upon a good consideration, although no definite time of forbearance is named.

In *Hakes* v. *Hotchkiss*, 23 Vt. 235, it is said, "If no agreement be made as to the length of time, during which the promissee will forbear, the law will presume, that he undertakes to forbear for a reasonable time; and this is sufficiently certain and is a good consideration."

Parsons in his work on contracts, vol. 1, p. 442, says, "Nor need the agreement to a delay be for a time certain, for it may be for a reasonable time only and yet be a sufficient consideration for a promise."

The Revised Statutes of the United States, sec. 5242, relating to banks, provides, among other things, that all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner provided in that chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void. It is insisted by the defendant, that a payment by the bank at the time

the plaintiff called for his money would have been void under this provision of the statute; that the plaintiff lost nothing by his agreement and forbearance; and that neither the bank nor the defendant were benefited thereby. Notwithstanding this statute and the insolvency of the bank, the plaintiff waived a legal right in consideration of the defendant's promise. Before he agreed to forbear, the certificates were not subject to any defence, and he could have negotiated them, and they would have been payable on presentation at the bank. By surrendering them and taking a new certificate impaired by his agreement to forbear, he made his claim subject to a defence that would be likely to effect its negotiability and value. Had the plaintiff drawn his money, it is not certain that the receiver would have called for it, or that he would have recovered it by an action. A determination of the receiver's right to the money might necessitate a trial of doubtful issues of law and fact. The plaintiff had a right to draw, and to try and hold, the money. He waived this right in consideration of the defendant's promise. But for this promise he would have drawn his money January 14, 1884. The receiver was not appointed until some three months thereafter, during which time no one could have rightfully called on him for the money; and during this time, at least, he waived his right to have and enjoy his money. He may, or may not, have been damaged by waiving these rights. He waived them in consideration of the defendant's promise, and that is sufficient

Consideration does not necessarily depend upon whether the thing promised results in a benefit to the promisee, or a detriment to the promiser. It is enough that something is promised, or the exercise of a present right is foreborne. In Anson on contracts, 62, it is said: "Courts will not inquire whether the thing which forms the consideration does, in fact, benefit the promisee or a third party or is of any benefit to anyone. It is enough that something is promised, done, foreborne, or suffered by the party to whom the promise is made, as a consideration

for the promise made to him." The law will not enter into an inquiry as to the adequacy of the consideration for a promise but will leave the parties to be the sole judges of the benefits to be derived therefrom, unless the inadequacy of the consideration is so gross as of itself to prove fraud or imposition. *Judy* v. *Louderman*, 48 Ohio St. 562, (29 N.E. 181.) In general, a waiver of any legal right, at the request of another party, is a sufficient consideration for a promise. Parsons on contracts, vol. 1, p. 444. Any damage or suspension, or forbearance of a right, will be sufficient to sustain a promise. 2 Kent's Com., 12 Ed., p. 465. In *Burr* v. *Wilcox*, 13 Allen, 273, Wells, J., in defining consideration, says: "Any act done at the defendant's request and for his convenience, or to the inconvenience of the plaintiff, would be sufficient." The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance detriment, loss or responsibility given, suffered or undertaken by the other." Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a promise made without fraud, and with full knowledge of all the circumstances. *Doyle* v. *Dixon*, 97 Mass. 213. Pollock in his work on contracts, p. 166, says: "Consideration means not so much that one party is profiting as that the other abandons some legal right in the present." In *Boyd* v. *Freize*, 5 Gray, 554, Shaw, C. J., says: "An agreement, therefore, to forgo one's legal right, or forbear collecting a debt, or enforcing any other beneficial right, is a good consideration for an express promise made upon it. Such agreement may be expressed, or implied by law."

There was evidence tending to show that the defendant was a maker of the certificate; and, if such maker, his undertaking was to pay the plaintiff the amount called for by the certificate when it, properly endorsed, should be returned to the bank.

The bank having been closed and a receiver appointed, a return of the certificate, properly endorsed, to the receiver, was all that was required. No other demand or notice was necessary before bringing suit. There were no officers of the bank to whom the certificate could be returned. The funds of the bank were in the hands of the receiver, and, for the purpose of returning the certificate as therein provided, the receiver was the bank.

The plaintiff was allowed to testify that he would not have left his money in the bank, if he had not understood that the defendant was obligated to pay it. The plaintiff was allowed to testify, without objection, that he went to the bank for the purpose of drawing his money; and there was no error in allowing him to state that he would have done what he purposed to do but for the defendant's promise.

The defendant requested the Court to instruct the jury, "That if Albert Sowles and Edward A Sowles signed the certificate as endorsers, with the right of demand and notice, then, under the testimony, the defendant is not liable." We think, from the testimony, that if Albert and Edward A Sowles were endorsers, then the defendant was an endorser; but the necessity for such instruction was obviated by the instruction, that, if the jury found that the defendant was an indorser, then the plaintiff could not recover, and it was not error to decline to give the instruction requested. Whatever may have been the relation of the signers of the certificate to each other, they were, for the purpose of determining their liability to the plaintiff, either makers or endorsers of the certificate. The evidence showing the understanding between the signers of the certificate as to their respective liability to the plaintiff, and as between each other, was not withdrawn from the consideration of the jury; and it was for them to say, from all the evidence, whether the undertaking of the defendant was that of a maker or that of an endorser.

The Court told the jury that, if nothing was said to the

plaintiff to explain to him that their obligation on the certificate was that of endorsers, and not makers, he had the right to understand that they were makers and absolutely liable upon it. It is insisted by counsel for the defendant, that the affixing of the word "surety" to the defendant's name was notice to the plaintiff that the defendant intended to limit and restrict his liability; and that this fact should overcome the presumption of law laid down by the Court. The word "surety" affixed to the defendant's name only indicated to the plaintiff the fact that the defendant was surety for the bank, and this was already known to him. He knew, that the bank had the money; that the defendants, E. A. Sowles and A. Sowles, did not have it; and that, in fact, they were sureties for the bank; but this fact did not change the undertaking of the defendant from that of a maker to that of an endorser entitled to demand and notice. A surety is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any person lawfully holding the paper. *Bank of Newbury* v. *Richards et al.*, 35 Vt. 284. The defendant was liable, *prima facie*, as a maker of the certificate. *Bank of Bellows Falls* v. *Dorset Marble Co.*, 61 Vt. 106; *Strong* v. *Riker*, 16 Vt. 554. But this presumption was susceptible of being controlled by evidence of the real obligation intended to be assumed by the defendant, and known to the plaintiff. The Court made a proper application of this rule in admitting evidence as to what transpired before and at the time of the execution of the certificate of deposit, as affecting the liability of the defendant, and told the jury that, if they found that the defendant was an endorser, then the plaintiff could not recover. To justify the verdict returned by the jury, they must have found that the defendant's undertaking was that of a maker of the certificate.

The Court told the jury that, if the defendant put his name upon the certificate for the purpose of stopping a run on the bank and tiding it over its then exigency, this would be a suffi-

cient consideration. If this was not the true test of consideration, the defendant has no reason to complain. It was not necessary that he receive a consideration; as the evidence stood, the question as to whether he received a consideration was an immaterial issue, and the defendant was not prejudiced by the court's submitting such issue to the jury. It appeared from the undisputed facts that his principal received a sufficient consideration to support his promise. This was all that was required. *Moore* v. *McKenney, supra; King* v. *Upton, supra; Howe* v. *Taggart, supra.* The Court might have properly held that a sufficient consideration was established by the uncontradicted facts, and withheld this question from the consideration of the jury.

The plaintiff concedes that there was error in the *pro forma* ruling of the Court upon the question of interest, and offers to remit the excess of interest included in the judgment rendered in the County Court.

Judgment reversed; judgment for the plaintiff to recover nine hundred and sixty-two dollars, with interest to be computed at the rate of four per cent. per annum from the date of the certificate to the date of the writ, and six per cent. thereafter, and his costs in the County Court, less the dividends paid on the certificate by the receiver and the defendant's costs in this court.

In re George W. Thorpe.

In Re GEORGE W. THORPE.

Insane asylum. Discharge by supervisors. Revocation by one.

A person who has been discharged from the insane asylum by the supervisors of the insane, cannot be recommitted under a revocation of that discharge by a single supervisor, although it was a condition of his original release that he might be.

Petition for habeas corpus, returnable to and heard at the January term of the Supreme Court, 1892. The case appears in the opinion.

F. W. McGettrick, for the relator.

A. K. Brown, State's Attorney, for the State.

The opinion of the court was delivered by

START, J. The relator was, on the 19th day of March, 1891, an inmate of the asylum for the insane at Brattleboro, Vermont; and, on that day, Homer Goodhue and C. M. Ferrin, two of the three supervisors of the insane, ordered the relator discharged from said asylum upon condition, that, in case it should become necessary to return him to the asylum, it might be done by a revocation of their order by one of them. The relator was thereupon discharged from the asylum. On the 21st day of August, 1891, said C. M. Ferrin revoked the order made by himself and said Homer Goodhue, and thereupon B F. Kelley, sheriff of Franklin County, took the relator into custody for the purpose of returning him to the asylum. The relator brings this petition to procure his release from such custody.

R. L., sec. 2897, provides that the General Assembly shall elect biennially three supervisors of the insane. No. 86 of the Acts of 1888, repeals this section, and provides for the appointment of such supervisors by the Governor,

by and with the advice and consent of the Senate. No. 48, sec. 4, of the Acts of 1882, as amended by No. 52, sec. 5, of the Acts of 1884, provides that idiots and persons *non compos* who are not dangerous shall not be confined in an asylum for the insane; and, if any such persons are so confined, the supervisors of the insane shall cause them to be discharged. And the supervisors shall have authority to discharge conditionally such "incurable" persons as may, in their judgment, be safely and properly cared for in the place from whence they were committed, but such persons shall require only the revocation of their discharge by the supervisors for their recommitment to the asylum.

In discharging the relator from the asylum the supervisors could impose such conditions only as were authorized by the statute. The question passed upon by them related to the personal liberty of the relator, and, when a majority of them had once adjudged that he be discharged, he could not again be deprived of his liberty except in the manner pointed out in the statute. The statute provides that, when a person is discharged from an asylum conditionally, only a revocation of his discharge by the *supervisors* shall be required for his recommitment. This clearly means a revocation of the discharge by a majority of the supervisors. R. L., sec. 3, provides, that, where joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient, and shall be required in its exercise. The supervisors having adjudged that the relator could be "safely and properly cared for" in the place from whence he was committed, and ordered his discharge, he could not be lawfully recommitted to the asylum, by authority of the statute authorizing them to impose conditions, until a *majority* of them had adjudged that he could not longer be "safely and properly cared for" in the place from whence he was committed, and revoked his discharge. This called for the finding of facts and the exercise of judgment and discretion by a majority of the board. The duties imposed and the powers conferred by the statute could

not be performed by, or delegated to, one of their number. They could not impose a condition by which a revocation of the discharge by one of their number would have the effect of depriving the relator of his liberty. The power to revoke a discharge is not conferred upon one of their number, but upon a majority of them.

It is adjudged that the relator is unlawfully deprived of his liberty, and it is ordered that he be discharged.

STILPHEN *v.* READ.

Practice. Exceptions. New trial.

1. When the record does not disclose what the exceptions taken and allowed in the County Court were, there is nothing for the Supreme Court to consider.
2. A petition for a new trial made and denied in the County Court will bar a similar petition in the Supreme Court for the same cause and supported by the same evidence.

Assumpsit. Trial by jury at the September term, 1890, Ross, J., presiding. Verdict and judgment for the defendant. Exceptions by the plaintiff.

The defendant moved in the Supreme Court to dismiss the exceptions for that no question of law was presented by them.

At the same term of the County Court at which the trial was had, the plaintiff moved that court for a new trial in said cause and supported his petition by certain affidavits. This petition was denied by the County Court and no exception was taken. Subsequently he brought a petition for a new trial to the January term of the Franklin County Supreme Court, 1891, which was heard with the exceptions. This last petition was sup-

ported by the affidavits of the same persons testifying to substantially the same facts as in the County Court.

M. Buck, for the plaintiff.

Hogan & Royce, for the defendant.

The decision of the County Court denying the motion for a new trial was a bar to a similar proceeding in the Supreme Court upon the same evidence. *Briggs* v. *Gleason*, 27 Vt. 114; *Hill, Admr.* v. *New Haven*, 37 Vt. 501; *Knapp* v. *Fisher*, 49 Vt. 94; *Gifford* v. *Willard*, 55 Vt. 36.

The opinion of the court was delivered by

TAFT, J. The record shows a verdict for the defendant and a motion to set it aside. It argumentatively appears that there was judgment upon the verdict. It is stated in the record that exceptions were allowed, otherwise it does not appear that any were taken, and it is not disclosed what those allowed were. There is no legal question before us.

Judgment affirmed.

A petition for a new trial addressed to this court, was heard at the same time. The cause alleged was newly discovered evidence. A motion for a new trial was made in the County Court and denied. The allegations in the petition, and the proofs, are the same in both cases. We hold the proceedings in the County Court a bar to the petition now before us. A party should not be a second time annoyed by the same claim, supported by the same testimony.

The petition is dismissed with costs.

WILLIAM H. RUGG AND WIFE *v.* PATRICK WARD.

Deed. Latent ambiguity. Oral evidence.

Where the description in a deed is mostly by courses and distances, which when applied to the premises, will not coincide exactly with the monuments given, nor return to the point of beginning, oral evidence is admissible to explain the ambiguity.

Trespass for the cutting of certain trees. Heard upon the report of a referee at the September term, 1891, Tyler, J., presiding. Judgment *pro forma*, for the plaintiffs. The defendant excepts.

In 1865 the female plaintiff conveyed the premises owned by the defendant to one Hallihan describing them as bounded on the east by the "Lewis H. Beals farm," and Hallihan conveyed to the defendant by the same description. It was claimed that the trespasses were committed on the said Lewis H. Beals farm, of which the female plaintiff had become the owner, and the question was as to the location of the division line.

In 1857 certain proceedings were had in the Probate Court for the partition of this Lewis H. Beals farm, and the present west line was then surveyed out by monuments, courses and distances. A portion of the farm bounded on the west by this line was set by such courses and distances to Gridley Beals. The next year Gridley Beals conveyed the premises so set to him to one Lewis E. Beals, who thereby became the owner of the whole of the Lewis H. Beals farm. In 1864 he conveyed to one Page, who in 1888 conveyed to the female plaintiff.

Beginning at the point of beginning and running the controverted line by the courses and distances as specified in the set-out to Gridley Beals, the alleged trespass would be upon the defendant's land, but the courses and distances so applied would not return exactly to the point of beginning.

For the purpose of showing the location of the disputed line as claimed by them, the plaintiffs introduced parol testimony against the defendant's exception, tending to show that in 1847, the owner of the defendant's farm and the owner of the Lewis H. Beals farm agreed upon the location of this line between the two and employed the same surveyor to run it out who afterwards made the survey used in the Probate Court; that the termini of this line were then established, and the line indicated by marked trees; that in making the survey for the Probate Court ten years afterwards he intended to follow the same line; that the termini were still standing and that he re-marked the line trees. The evidence of the plaintiffs further tended to show that there was a high perpendicular ledge which formed a natural boundary between the two farms, which was a part of the line agreed upon and run out in 1847, and which was referred to in the description used in the Probate Court.

The referee found the line as claimed by the plaintiffs, provided the parol evidence above referred to was admissible.

A. P. Cross, for the defendant.

The record in the Probate Court established the line in dispute. The female plaintiff subsequently to such record conveyed the defendant's farm to the defendant's grantor and bounded it by the line so established. Hence that line is conclusive upon her and the written description cannot be varied by parol. *Ex'r. of Stevens* v. *Hollister*, 18 Vt. 300; *Hodges* v. *Strong*, 10 Vt. 247; *Lippett* v. *Kelley*, 46 Vt. 514; *Bagley* v. *Movill*, 46 Vt. 94; *Keenan* v. *Cavanah*, 44 Vt. 276; *Barnard* v. *Russell*, 19 Vt. 334; *Pingry* v. *Watkins*, 17 Vt. 379, 386.

H. C. Adams, for the plaintiff.

The courses and distances given in the record in the Probate Court are not consistent with the other monuments mentioned, nor with themselves. Hence parol evidence was properly admitted to show what the true line was. *Hull* v. *Fuller*, 7 Vt. 100; *Patch* v. *Keeler*, 28 Vt. 332.

William H. Rugg and Wife *v.* Patrick Ward.

Parol evidence may be introduced to show that a monument was erected which was not referred to in the deed. *Clary* v. *McGlynn*, 46 Vt. 347.

The opinion of the court was delivered by

ROSS, Ch. J. The question in controversy, is in regard to the division line between the land of the plaintiff and the land of the defendant.

The referee reports, that, if the oral testimony admitted, was properly received and considered, the line is as claimed by the plaintiff. The defendant derived his title from Stephen Hallihan, who received his from the plaintiff's wife. On the controverted line, they were bounded by the Lewis H. Beals farm. That farm was surveyed, and partitioned between the heirs of Lewis H. Beals in 1857. The portion adjoining the defendant's land was set to Gridley Beals. The survey of this portion is mostly by courses and distances. When these are applied to the land, commencing at the point specified and running, either as claimed by the plaintiffs, or as claimed by the defendant, some of the distances where no monuments are specified in the description, must be disregarded to some extent, to return to the point started from. This raises a latent ambiguity, or uncertainty, to solve which, oral testimony may be received. As said by Redfield, Ch., J. *in Patch et ux.* v. *Keeler et al.*, 28 Vt. 332, "It is evident that the uncertainty arises from the state of the subject matter, and not from the terms used in setting out the dower. And it being a latent ambiguity, it may commonly be explained by oral evidence. As it arose from the nature of the subject matter, oral evidence is admissible always to ascertain that subject matter."

To the same effect is *Hull* v. *Fuller*, 7 Vt. 100; *Clary* v. *McGlynn*, 46 Vt. 347; *Pingry* v. *Watkins*, 17 Vt. 379. None of the cases cited by the defendant's counsel controvene these decisions. When no uncertainty arises in regard to which of two claimed lines is the correct one, upon application of the courses and distances, or other description of the premises; to the

subject matter, then, unless controlled by monuments, the line indicated by the courses and distances must be taken. The language of the description controls, unaided by oral testimony, and it is the duty of the court to construe it.

But if the application of the description to the subject matter manifests that all its terms cannot exactly be fulfilled, and that by rejection of nearly equal portions of the description, by varying the courses, or shortening or lengthening the distances, in two or more ways the description becomes applicable, and it is uncertain which is the one intended by the parties, oral testimony may be received to remove the uncertainty, as was done by the referee.

Judgment affirmed.

STATE *v.* HENRY CASAVANT.

Larceny. Allegation and proof of ownership. Amendment.

1. Where personal property is stolen from the possession of a railroad company, by whom it is being transported as baggage, the ownership is properly laid in such company.

2. The trial court may, under No. 86, Acts of 1882, allow an indictment for larceny to be amended on trial by changing the name of the person in whom the ownership is laid.

Indictment for the larceny of a trunk and contents. Trial by jury at the September term, 1891, Tyler, J., presiding. Verdict of guilty. Exceptions by respondent.

The opinion states the case.

F. W. McGettrick, for the respondent.

The ownership should have been alleged in Mrs. Gilson, the real owner. Otherwise the respondent may be again prosecuted

for the same offence. 2 Rus. Cr. 739 and 795; 1 Whar. Am. Crim. Law, 595.

A. K. Brown, State's Attorney, for the State.

The opinion of the court was delivered by

TAFT, J. The property stolen belonged to Mrs. Gilson, living in New Hampshire, to whom it had been assigned as part of an estate at Malone, N. Y. Lincoln E. Spaulding, who had held the property as administrator, was taking it to Mrs. Gilson, he going as a passenger, and it as baggage, on a train of the Central Vermont Railroad Company. It was in the company's possession, at its station in St. Albans, when stolen. In the indictment as presented, the ownership of the property alleged to have been stolen was laid in said Spaulding. It was amended by striking out his name and inserting in lieu of it, that of the railroad company.

1. The respondent insists that the ownership of the property should have been alleged in Mrs. Gilson, arguing that in this way only could a conviction under the indictment be a bar to a subsequent prosecution alleging the ownership to be in her. We are not inclined to adopt this view of the law, and shall not, until the court so decide, but shall assume otherwise. Under our statute, R. L. s. 1707, it is provided that in the prosecution of an offence committed in stealing personal estate, it shall be sufficient and not a variance, if it is proved on trial that at the time the offence was committed the actual possession of the property was in the person alleged in the indictment to be the owner thereof. The Central Vermont Railroad Company having the actual possession of the property, it was no variance when it appeared, that Mrs. Gilson owned the property, provided the amendment was properly made.

2. Did the court err in permitting the amendment? The statute, Acts 1882, No. 86, provides that when a variance appears between the averments, and evidence offered in proof, in

the name of any person alleged to be the owner of any property which forms the subject of the offense charged, etc., the court if it considers such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence upon such merits, may order the indictment amended according to the proof. It is argued that no amendment was proper, by which the person would be changed, but only such as was descriptive of the person alleged to be the owner. The gist of the offence of larceny is the felonious taking of property; as constituting the offence, it is immaterial who the owner may be; he may be unknown; the property may be taken from a repository containing that of many persons; errors in the names of persons, and in the persons, of the owners, may frequently occur, and to obviate such difficulties no doubt occasioned the statute, and we see no objection under it to an amendment changing the person alleged to be the owner. The rights of the respondent are properly guarded by that part of the act, permitting it only in case the court consider the variance not material of the case and the respondent not prejudiced in his defence upon such merits. The respondent does not claim that the court improperly exercised its discretion, nor that he was in fact injured upon trial by such amendment, but that as matter of law the court had no power to make it. The action of the court was fully warranted by the statute.

Exceptions overruled, judgment of guilty upon the verdict and sentence thereon and execution thereof ordered.

L. H. and J. P. Rich, *Exrs. v.* Albert Sowles, *Admr.*

L. H. AND J. P. RICH, EXRS. *v.* ALBERT SOWLES, ADMR.

Administrator cannot contract debt against estate. Suit and judgment against administrator.

1. An administrator cannot contract a debt against the estate which he is administering.
2. If a writ and declaration run against A, administrator of B's estate, the writ is against A personally, and not against the estate, for the words "administrator of B's estate" are merely *descriptio personae* and might be rejected as surplusage.
3. So a judgment, following such a writ and declaration, against A "as administrator," is not a judgment against the estate, but against A personally.

General assumpsit. Heard at the September term, 1891, Tyler, J., presiding. The defendant first demurred to the plaintiffs' declaration. The demurrer was overruled and thereupon a trial was had upon the merits by the court, which gave judgment for the plaintiffs. The defendant excepted both to the overruling of his demurrer and the rendition of judgment.

The plaintiff claimed to recover the price of a pair of horses sold the defendant. At the time of the sale the defendant was the administrator of one W. L. Sowles, and was carrying on a farm belonging to the estate of his intestate. The horses were bought for use on this farm. The sale was by letter. The plaintiffs' intestate addressed the defendant as, "A. Sowles, Admr.," and the defendant signed, "A. Sowles, Admr." The writ and declaration ran against "Albert Sowles, administrator of W. L. Sowles' estate," and the court rendered judgment against the defendant "as administrator."

E. A. Sowles and *H. A. Burt*, for the defendant.

An administrator cannot be sued at law as administrator. *National Bank* v. *Weeks*, 53 Vt. 115; *Freeman* v. *Holt*, Wind-

sor county, 1879; *Lovell* v. *Field*, 5 Vt. 218; *Luscomb* v. *Ballard*, 5 Grey, 405; *Sumner, Admr.*, v. *Williams*, 8 Mass. 162; *Foster* v. *Fuller*, 6 Mass. 58; *Taylor* v. *Mygatt*, 26 Conn. 184.

S. E. Royce, for the plaintiff.

In any event the defendant is personally liable. *Lovell* v. *Field*, 5 Vt. 218.

The words administrator, etc., may be rejected as surplusage. *Myers* v. *Lyon*, 51 Vt. 272; *Jones* v. *Tuttle*, 54 Vt. 488; *Johnson* v. *Nash*, 20 Vt. 40; *Waterman* v. *Conn. & P. R. R.*, 30 Vt. 614.

But the defendant is also liable as administrator at the election of the plaintiff. Schouler Exs. and Admrs., s. 363; *De-Valengin* v. *Duffy*, 14 Pet. 282.

The opinion of the court was delivered by

ROSS, Ch. J. The declaration sets forth a good cause of action, and was properly adjudged sufficient against the causes alleged in the demurer. It commands the attachment of the goods, chattels or estate of Albert Sowles, administrator of Wm. L. Sowles' estate, and not of the estate of Wm. L. Sowles, of which Albert Sowles is administrator. The words administrator of Wm. L. Sowles' estate, are descriptive of the person named, as the defendant in the suit. If by chance there were two persons of that name in that locality, these descriptive words would direct the officer serving the writ to the person intended. The common counts in general assumpsit, constitute the declaration. Those declare that the defendant, viz: Albert Sowles, and that one who holds the office of administrator on the estate of Wm. L. Sowles, is indebted, and made the promises, to the testator, whose will the plaintiffs are executing. The plaintiffs do not declare, nor seek to recover upon a promise or undertaking of Wm. L. Sowles, the intestate, of whose estate Albert Sowles is administrator. Inasmuch as the defendant is the legal representative of the estate of Wm. L. Sowles, if

the declaration sought a recovery upon the promise or undertaking of the intestate, it would be necessary to describe him as such representative. Then the recovery would be against the estate, or the defendant as the representative of the estate. The judgment in such a case, would be against, and to be satisfied out of the estate, and not out of the property of Albert Sowles. The words "administrator of Wm. L. Sowles' estate" in such an action would be descriptive of the capacity in which Albert Sowles was sued, and that he stood as the representative of the estate of Wm. L. Sowles. Hence, when these words in the declaration, follow the name of the party, whether they will be deemed descriptive of his person, or descriptive of the character or capacity in which he is sued, is determined by the allegations of the declaration. If the declaration is against him personally, they will be held to be descriptive of his person. That is the only office they can serve in such a declaration. They may be rejected as surplusage. If the declaration is against the estate which he represents, and the promises declared upon are not his promises, but the promises of the person he represents, then they will be held to be words properly used, necessary to set forth the representative character in which he is sued. The allegations of the declaration and the facts found show a personal promise by the defendant, and these words are only descriptive of the person intended to be named as defendant. The writ might be amended by striking them out. *Johnson* v. *Nash*, 20 Vt. 40; *Waterman* v. *Conn. & Pass. R. R.*, 30 Vt. 614; *Myers* v. *Lyon*, 51 Vt. 272; *Jones* v. *Tuttle*, 54 Vt. 488.

As contended by the defendant, an administrator has no authority, as such representative, to create any debts against the estate. He only has authority by virtue of his office, to administer upon the estate; that is, to ascertain both its assets, and debts, and to put the former in condition to pay the latter, if sufficient, and the surplus, if any, in a condition to be distributed to those legally entitled thereto. Whatever proper expenditures

he may make in accomplishing this will be allowed him by the Probate Court, out of the estate, on the settlement of his administration account. But, if in caring for and administering upon the estate, it becomes necessary to incur an indebtedness, he can bind himself and not the estate for its payment. He cannot incur a debt, in the administration of the estate, and bind the estate for its payment. He can bind himself only for such payment. Upon his becoming insolvent, equity will not enforce the payment of such a debt out of the estate. *Lovell* v. *Field*, 5 Vt. 218; *National Bank* v. *Weeks*, 53 Vt. 115.

Whether, when trust or other property not owned by the estate, has become mingled with it, a suit may be maintained for its recovery out of the estate against the administrator in his representative capacity, as was held in *De Valengin* v. *Duffy*, 14 Pet. 289, is not involved in this suit and need not be considered.

The execution for the enforcement of the judgment follows the writ. *Rider* v. *Alexander*, 1 D. Chip. 267; *Perry* v. *Whipple*, 38 Vt. 278; *Wright* v. *Hazen*, 24 Vt. 143. As the writ is against the defendant, not representatively but personally, so must the judgment and execution be. Rendering judgment against the defendant, "as administrator," did not make it a judgment to be enforced out of the property of the estate of which the defendant is administrator, but to be enforced against the defendant's own property. Adding administrator to his name when the defendant purchased the horses, did not bind the estate for their payment, but bound the defendant. No more does such addition to his name in the judgment affect the nature of the judgment, or change it from a judgment to be satisfied out of the defendant's property, to one to be satisfied out of the property of the estate. Such addition in making the contract and rendering the judgment might indicate that the debt was contracted by the defendant, in administering upon the estate, and that he claimed that it constituted an item in his administra-

tion account. It might be rejected as surplusage, or by way of amendment, without changing the legal nature of the contract or judgment.

This disposes of all the contentions insisted upon in this court.

Judgment affirmed.

EDWARD A. SOWLES *v.* JOHN HANLEY.

Sale of real estate on execution. Who entitled to rents during period of redemption.

The purchaser of real estate at an execution sale is not entitled to the rent thereof during the six months allowed the debtor for redeeming the same, under No. 139, 1884.

Assumpsit for rent. Trial by court at the April term, 1891, Rowell, J., presiding. Judgment for the plaintiff. Exceptions by defendant.

The case appears in the opinion.

Wilson & Hall, for the defendant.

When real estate is sold upon execution, the purchaser must pay for the same as of the day of the sale. There is nothing in the law to prevent his taking immediate possession. If entitled to possession he would be entitled to the rent. No. 139, ss. 2-10, Acts of 1884.

In analogy to the law of set-off upon execution, the debtor has merely a right of redemption. R. L. ss. 1574, 1579; *Moore* v. *McMillan*, 54 Vt. 27; Rorer on Sales, ss. 786, 809, 810, 772, and cases there cited; *Burk* v. *Bank of Tennessee*, 3 Head 686;

Slayton v. *Morris*, 4 Harr. (Del.) 224; *McKnight* v. *Gordon*, 13 Rich. (S. C.) Eq. 222; *Kline* v. *Chase*, 17 Cal. 596; *Dickenson* v. *Kenney*, 5 Minn. 409.

E. A. Sowles pro se.

The debtor had the right to possession and the right to redeem for six months after sale. No. 39, Acts 1890.

The opinion of the court was delivered by

THOMPSON, J. This is an action to recover for the use and occupation of a house and lot belonging to the plaintiff and occupied by the defendant from Feb. 17, 1887, to Sept. 3, 1887, at a rent of $15 per month, payable monthly. On the 3d day of March, 1887, the premises were sold to one Geo. A. Ballard on an execution against the plaintiff in favor of O. F. Bellows, under a levy made Dec. 17, 1886, as provided by *St.* 1884, No. 139. The plaintiff did not redeem the premises under the statute and his interest therein expired by virtue of this sale on the 3d day of Sept., 1887. Soon after the sale the defendant was notified by Ballard that he claimed the rent during the time allowed for redemption, and the defendant agreed to pay and has paid the rent to him, Ballard indemnifying him for so doing. The only contention now made by the defendant is that the purchaser at the execution sale is entitled to the rent during the six months allowed for redemption, if the premises are not redeemed by the debtor, and that consequently he was bound to pay the rent to Ballard, and is thus discharged from liability to the plaintiff.

By *St.* 1884, No. 139, s. 1, all proceedings for the satisfaction of executions by appropriations of real estate, were to be under that act unless the debtor elected in writing to proceed by appraisal and set-off as provided by R. L. ss. 1565-1592. By R. L. ss. 1579–1582, it was provided that the debtor should be responsible to the creditor or his legal representatives for the rents, profits and improvements of improved or tenantable estate appraised and set-off to the creditor on execution, if the debtor

did not redeem within six months from the time such execution was extended. The earliest enactment on this subject was an act passed March 7, 1797 (Laws of Vt., Tollman's Compilation 326, s. 6), and which was substantially the same as the provisions of the R. L. on that subject. The creditor's right to rent under these statutes was limited to the case of a *set-off* of real estate on execution. No. 139, *St.* 1884, gives the creditor no right to rent during the time allowed for redemption, when the real estate is sold on execution instead of being set-off. No right to rent being conferred upon the purchaser at the execution sale by this statute, we hold that he is not entitled to rent during the time allowed for redemption. By the passage of *St.* 1890, No. 39, the legislature, itself, seems to have put this construction upon No. 139.

Judgment affirmed.

ADDISON COUNTY.

FEBRUARY TERM, 1892.

PRESENT: TAFT, ROWELL, TYLER AND MUNSON, JJ.

TOWN OF WEYBRIDGE *v.* WILLIAM M. CUSHMAN.

Pauper. Transporting into other town. Verdict against evidence.

1. A person is liable under R. L. s. 2844 for transporting a pauper from one town to another with intent to charge the latter with the pauper's support,even though such latter town is legally chargeable therewith.
2. *Held*, that upon the defendant's own testimony he was guilty of the offence charged, and that a special verdict to the contrary was against the evidence and should be set aside.

This was an action in two counts under R. L. s. 2844, the first count to recover the penalty and the second to recover the amount expended in the pauper's support. Plea, the general issue. Trial by jury at the December term, 1891, Ross, Ch. J., presiding. The jury returned a special verdict, upon which the court gave judgment for the defendant. The plaintiff excepts.

The pauper in question was a boy named Charlie, about eight years of age, and the illegitimate son of one Ida Cudworth. When Charlie was about two years of age Ida Cudworth married John McCullom, and in the winter of 1888-9 was living with her husband in the town of Randolph. They were extremely poor, and in August, 1890, agreed to separate.

Thereupon the husband went to live at Royalton where he afterwards resided, while Mrs. McCullom with Charlie went to live at the house of one Lucy Sanders in Weybridge, where her father made his home, and where she continued to reside with Charlie until October 29, 1890. On that day she took the child to the Home for Destitute Children in Burlington where he remained until April 18, 1891, when an officer of the Home brought the child to Middlebury and arranged with one Williamson to carry him to the house of Lucy Sanders. Williamson carried the child a part of the way when he met a boy of Lucy's, who took Charlie home with him. He was refused admission to the house and remained on the door step for about two hours, when Lucy carried him to the defendant, who was the overseer of the poor for the town of Middlebury, in whose care he remained until the following day. Then the defendant re-transported him to the house of Lucy, and it was for this act that the suit was brought.

The defendant himself testified that Lucy Carter brought the child to him one afternoon about three o'clock, saying she was going away and there was no place for the child to stay; that he told her the child was not for him to take care of, but that he would take it until the next day; that she did not return for it the next day, and that he took it to her house and left it there; that he then told her the child didn't belong to Middlebury and that she would have to see the Weybridge poormaster; that he thought the boy belonged to the town of Weybridge and would have to go there.

The plaintiff requested the court to charge the jury that the plaintiff might recover on the first count although both Ida and Charlie had their residence at the time of the transportation in the plaintiff town. This the court declined to do, and instructed them upon that point as follows:

"1. The very language of the statute, 'intent to charge,' means to charge with the support wrongfully, when he had no

right to take him there as a pauper of that town; and as the intent is the gist of this recovery certainly under the first count, you must find the intent, that he intended to do that."

The jury returned several special findings of which the third was as follows:

"Third. That defendant did not carry Charles McCollum to Weybridge with intent to charge the town of Weybridge with the support of the child."

The plaintiff moved to set aside said third finding as against the evidence, which motion the court overruled.

Stewart & Wilds, for the plaintiff.

W. H. Bliss, for the defendant.

The third finding was warranted by the evidence. *Wallingford* v. *Gray*, 13 Vt. 228; *Barnet* v. *Peacham*, 33 Vt. 205; *St. Johnsbury* v. *Goodenough*, 44 Vt. 662.

The opinion of the court was delivered by

TAFT, J. A person is liable to the penalty mentioned in s. 2844 R. L. if he transports a pauper from one town to another town with intent to charge the latter with the pauper's support, and he is liable even if the pauper is a resident of the town to which he is transported, and the latter town chargeable with the pauper's support. The first request of the plaintiff embodying this proposition should have been complied with. In failing to do so, the court erred, and we see nothing in the charge as given that corrected the error. The jury were told that if one town contracted with a person in another town, to support a pauper for a definite time and at the end of the time refused to do anything further with him, the party had the right to return the pauper to the town making the contract. The court then (see paragraph six) applied this rule to the case under consideration. In so doing there was error. If Mrs. Sanders procured the defendant to keep the child until the next day, in Middle-

bury, and did not take the child away at the time named, the defendant had no right to carry the pauper back to Weybridge with intent to charge that town with its support. If he did he would be liable to the penalty named in the statute. Had the arrangement to keep the child in Middlebury been made by the town of Weybridge, or its authorized officials, a different question would have been presented, and the act of the defendant in taking the child back to Weybridge might have been legal and the charge of the court warranted. But the rule has no application to a contract made by a private person to keep a pauper in another town than the one in which he is residing.

The third finding was against evidence. The point involved was, did the defendant take the pauper to Weybridge with intent to charge that town with its support. He testified that he started to take the child back to its mother at Mrs. Sanders', supposing she lived in Middlebury near the bridge between the two towns, but that on his way he inquired of some one who told him she lived across the river in Weybridge; that he then made up his mind that the pauper was chargeable to Weybridge; he had no doubt but that Weybridge would take care of him and that the result would be that it would have to take care of him. The defendant knew the child was a pauper; he testified that he told Mrs. Sanders "that she would have to see the Weybridge poormaster; that he would see him for her; that Mrs. Sanders told him she was not able to keep the boy." The defendant further testified "I thought he would have to go to the town of Weybridge; I thought he belonged there; I thought he didn't belong to the town of Middlebury and I would take him back and let them (Weybridge) pay." The defendant ought not to complain if the court consider his testimony as true. From it, there can be but one conclusion, as to the intent with which he took the child to Weybridge, and that is, that he intended to charge the plaintiff with its support.

The petition for a new trial and the other special findings become immaterial.

Judgment reversed, cause remanded.

JOEL RANDALL'S ADMR. *v.* MILO B. RANDALL ET AL.

Competency of witness when party dead. Contract in issue. Administrator a party. Allowance by commissioners in favor of administrator.

1. The intestate, being indebted to A in the sum of $1000 evidenced by a promissory note, conveyed, without consideration, all his property to the defendants. This note was subsequently allowed against his estate and the orator sued to recover a sufficient amount of the property so conveyed to satisfy the allowances against the estate and the expenses of administration. The defendants claimed in defense that at about the time of the conveyances, the intestate loaned T one thousand dollars upon an agreement between himself, A and T that T should satisfy said loan by paying A the amount due her, and that A consented to said arrangement, and agreed to take T as her debtor. *Held*, that, A having deceased, T was not a competent witness, for that this tripartite agreement was in issue and on trial.
2. Nor is the widow of the intestate a competent witness to that agreement, she being an annuitant under the conveyances which it is sought to impeach, and a party to the suit.
3. The report of commissioners allowing this claim against the estate of the intestate, duly accepted by the Probate Court, is, under the circumstances of the case, evidence of a valid subsisting debt, notwithstanding that the orator was both the administrator of A and of the intestate in the making of said allowance.
4. The orator should have decree for a re-conveyance of the property unless, within a given time, the defendants pay the balance due on the note with costs.

This was a bill in chancery brought by the orator, as the administrator of Joel Randall, for the recovery of certain real estate alleged to have been conveyed by the intestate without con-

sideration. Heard at the June term, 1891, upon the pleadings, report of a special master, and exceptions of the defendants thereto. Ross, chancellor, *pro forma*, overruled the exceptions and dismissed the bill. The orator appeals.

From the report of the special master it appeared that on the 30th day of January, 1882, Joel Randall, the intestate, was indebted to one Abigail Andrus in the sum of $1000 and interest from Jan. 9, 1881, said debt being evidenced by a promissory note of that tenor, and was also indebted to Chester Pratt in the sum of $8, and L. W. Spaulding in the sum of $4.50; that being so indebted, he conveyed all his real estate to the defendants without other consideration than love and affection, and soon afterwards disposed of all his personal property which was subject to attachment.

About the same time that he disposed of his personal property, he loaned one H. E. Taylor the sum of $1000 under an agreement that Taylor should pay Mrs. Andrus the amount due her from time to time, as she might require it. A written agreement was drawn up to that effect, which was as follows:

"Whereas, Joel Randall is indebted to Abigail Andrus in the sum of one thousand dollars and the interest thereon of an amount uncertain, evidenced by his promissory note now holden by her, and whereas said Randall has this day loaned me the sum of one thousand dollars, now in consideration thereof I hereby promise to pay to said Abigail, her administrator, executor, or assigns, the amount due on said note at the time when and whenever the same shall be called for by her, her administrators, executors or assigns, and upon the surrender to me of the aforesaid note. And the cancellation and surrender of said note by me shall be considered by said Randall, his executors, administrators, or assigns, as an entire satisfaction of this contract, and all my liabilities under or respecting the same.

"Dated at Cornwall, the 2d day of Sept., 1882.

H. E. Taylor."

Upon this contract the said Taylor made payments in small amounts from time to time. Feb. 27, 1884, Abigail Andrus died, being still the owner and possessor of the note. She left a will

which was duly probated, by which she nominated one Skinner as her executor. Said Skinner declined to act, and the said H. E. Taylor was, in April, 1884, appointed administrator of her estate with the will annexed, and as such administrator took possession of the note in question as a part of the assets of her estate.

January 4, 1886, Taylor resigned as administrator, and the orator was appointed his successor. The said note was thereupon turned over to him.

September 27, 1886, the orator, as administrator of the estate of Abigail Andrus, applied to have himself appointed administrator of the estate of Joel Randall, representing that the estate of the said Randall was indebted to him as the administrator of Abigail Andrus, and October 18, 1886, he was appointed such administrator. At the same time commissioners were duly appointed upon said Randall's estate, who, April 27, 1887, returned their report to the Probate Court, which was accepted by said court and not appealed from.

Said commissioners in their report allowed the claim in favor of the estate of Abigail Andrus, in the sum of $1,187.80, being the amount of the note and interest. The commissioners also allowed the claims before mentioned in favor of Chester Pratt and L. W. Spaulding.

The orator claimed to recover sufficient of the real estate conveyed to pay the debts allowed against the estate of the said Randall and the expenses of administration.

The defendants insisted that by the arrangement between himself and the said Taylor, Joel Randall had made due provision for the payment of this indebtedness to Abigail Andrus; that Abigail Andrus in her life time had been a party to that arrangement, having assented thereto, and agreed to accept payment from Taylor. In order to sustain this issue, they introduced the said Taylor as a witness, and proposed to show these facts by him.

The orator objected to the admission of this testimony, and the same was excluded by the master.

The defendants also offered upon the same issue the testimony of Mrs. Lucy Randall Barbour, the widow of Joel Randall and one of the defendants, who under the conveyances which it was sought to impeach, was entitled to an annuity. To the admission of her testimony the orator objected, and the same was excluded by the court.

The orator offered in evidence the report of the commissioners upon the estate of Joel Randall. To the admission of this report the defendants objected, for that the same was void as an adjudication for want of proper parties. The same was, however, received by the master as evidence.

The orator also offered in evidence the said note of $1,000. To the admission of this the defendants objected, for that, the same not having been duly presented to the commissioners upon the estate of Joel Randall, it could not now be urged as a claim against his estate. Against the objection of the defendants the note was received in evidence.

The defendants excepted to the report of the master:

1st. Because the master received the report of the commissioners.

2d. Because the master received in evidence the note.

3d. Because the master excluded the evidence of Taylor.

4th. Because the master excluded the evidence of Mrs. Barbour.

Stewart & Wilds, for the orator.

The judgment of the commissioners allowing this note against the intestate's estate was valid. *Riley* v. *McInlear's Est.*, 61 Vt. 254.

Taylor was not a competent witness. The fact sought to be established by him, was the making of a new contract between Abigail Andrus, the intestate, and himself. The contract was in issue, and the other party had deceased. *Farmers' Ins. Co.* v.

Wells, 53 Vt. 14; *Lytle* v. *Bond's Est.*, 40 Vt. 618; *Barnes* v. *Doxo*, 59 Vt. 546; 1 Whart. Ev. s. 466; *Chaffee* v. *Hooper*, 54 Vt. 513; *Richardson* v. *Wright*, 58 Vt. 367; *Canfield* v. *Bently's Est.*, 60 Vt. 655.

Mrs. Barbour was not a competent witness. The action was by an administrator, and she herself was a party. *Fitzsimmons* v. *Southwick*, 38 Vt. 509; *Ford's Exr.* v *Cheney*, 40 Vt. 153; *Hollister*, *Admr.*, v. *Young*, 42 Vt. 403; *McLane*, *Admr.* v. *Johnson*, 43 Vt. 52; *Roberts*, *Admr.*, v. *Lund*, 45 Vt. 82; *Davis*, *Admr.*, v. *Bank*, 48 Vt. 532.

Bliss & Royce, for the defendants.

The allowance by the commissioners was void for the reason that there were no proper parties to the suit. The same person cannot be both plaintiff and defendant. Dicey on Parties, 79; *Pierson* v. *Nesbitt*, 17 Am. Dec. 569; *Eastman* v. *Wright*, 6 Pick. 316; *Estes* v. *Whipple*, 12 Vt. 373; *Green* v. *Chapman*, 27 Vt. 236; *Green* v. *Russell*, 132 Mass. 536.

This principal applies to a judgment of the Probate Court accepting the report of commissioners. 3 Redf. on Wills, 247 and note; *Morse* v. *Slason*, 13 Vt. 306; *Adams* v. *Adams*, 22 Vt. 62; *French* v. *Windsor*, 24 Vt. 409 and note; *Moore* v. *Batchelder*, 51 Vt. 50.

Such a judgment is absolutely void. *Hendrick* v. *Cleveland*, 2 Vt. 329; *Moore v. Batchelder*, 51 Vt. 50; Freem. Judg., s. 120 and cases cited; *Adams* v. *Adams*, 22 Vt. 62, 71; *French* v. *Windsor*, 24 Vt. 409.

The defendants at all events, are not concluded by that judgment. They claim not as heirs, but as grantees, and as such, are strangers to the judgment. R. L. s. 2275; *Gilbert's Admr.* v. *Howe's Admr.*, 47 Vt. 402; *Sprague* v. *Waldo*, 38 Vt. 139; Freem. Judg. s. 156.

The testimony of Taylor should have been admitted. If true, it proved a novation which discharged the intestate. *Goochie* v. *Brock*, 52 Vt. 107; *Bacon* v. *Bates*, 53 Vt. 32; *Kelso* v.

Fleming, 1 West. Rep. 845; *Cadens* v. *Teasdale*, 53 Vt. 469; *Hayden* v. *White*, 26 Vt. 768; 1 Par. Con. 217.

This agreement was not, however, the contract or cause of action in issue and on trial. *Manufacturer's Bank* v. *Scofield*, 39 Vt. 590; *Lytle* v. *Bond*, 40 Vt. 618; *Cole* v. *Shurtleff*, 41 Vt. 311; *Morse* v. *Low*, 44 Vt. 561; *Walling* v. *Newton*, 59 Vt. 684; *Canfield* v. *Elias Bentley's Est.*, 60 Vt. 655.

Moreover the testimony was not offered *in his own favor*. *Jones* v. *Walcott*, 15 Gray 541; *Bigelow* v. *Hyer*, 3 Allen 243; *Gay* v. *Gay*, 5 Allen 157; *Granger* v. *Bassett*, 98 Mass. 462; *Looker* v. *Davis*, 47 Mo. 140; *Bradley* v. *West*, 68 Mo. 69; *Bell* v. *Western M. & F. Ins. Co.*, 39 Am. Dec. 542.

The testimony of Mrs. Barbour should have been admitted. *Looker* v. *Looker*, 47 Mo. 140; *Bradley* v. *West*, 68 Mo. 69.

The opinion of the court was delivered by

TYLER, J. The material allegations in the bill are that the intestate, Joel B. Randall, in January, 1878, became indebted to Abigail Andrus in the sum of $1000, which indebtedness was evidenced by his promissory note to her of that date; that in January, 1882, he conveyed all his estate to his heirs for no other consideration than love and affection; that the conveyances were made without making provision for the payment of this debt and were therefore void. The defendants in their answer admit that the $1000 debt was due from Randall to Mrs. Andrus at the time the conveyances were made, and aver that in September, 1882, the intestate made ample provision for its payment by placing $1000 in the hands of Taylor and taking from him the written obligation which is set out in the master's report, which was in substance a promise by Taylor to Randall that the former would pay the debt to Mrs. Andrus as she or her executor, administrator or assigns should call for it, which promise was in consideration of Randall's loan of $1000 to him. The answer further avers that Mrs. Andrus had notice of the arrangement and as

sented to it, that Taylor personally promised that he would pay her the debt as she required it, and that he subsequently paid her several sums amounting to $110; that Randall's relation to the note after placing the funds in Taylor's hands was that of a surety, and that he was released as such surety by the omission of the administrator and representatives of Mrs. Andrus to proceed against Taylor for the collection of the note.

The issues made by the pleadings were whether or not the intestate disposed of his property without making ample provision for the payment of this debt, and if not, whether the debt was still subsisting. It is alleged in the bill that he made no such provision: the answer meets this allegation with the averment that Taylor was, by a tripartite agreement, substituted for the intestate as debtor to Mrs. Andrus, and that the judgment of the Probate Court had no validity. The former question was not a collateral matter. It was the "cause of action in issue and on trial." It is apparent that the main question of fact in controversy before the master was as to the adequacy of this agreement as a provision for the payment of the Andrus debt. To sustain the defendants' side of this issue Taylor was offered as a witness to testify that Mrs. Andrus assented to the arrangement and agreed to accept him as the payor of the note. We think he was excluded by section 1002, R. L. *Insurance Co.* v. *Wells*, 53 Vt. 14, is full authority on this question.

Mrs. Barbour was an annuitant by a provision in the deeds from her first husband, the intestate, to his two sons, and was interested to have the conveyances upheld. She was therefore a proper and necessary party defendant to the suit. She was offered as a witness to testify to a conversation which it was claimed she had with Mrs. Andrus in which the latter stated that she was satisfied with the arrangement that had been made and that she should look to Taylor and not to Randall for payment. The offered evidence came within none of the exceptions to section 1003, R. L., and was excluded by the general inhibition of

that section, that when an executor or administrator is a party the other party shall not be permitted to testify in his own favor. It seems unnecessary to review the cases in which this section has been considered and construed; the leading cases are cited on the briefs of counsel.

Upon the evidence that was admitted by the master he was unable to find the novation claimed by the defendants. Had the excluded evidence been received, *query*, whether it would have availed them, the evidence not tending to show that the original payor was released. *Buchanan* v. *Paddleford*, 43 Vt. 64.

As to the other question raised we think the decision of the court in *Riley* v. *McInlear's Estate*, 61 Vt. 254, is full authority that the judgment of the Probate Court, in the circumstances of this case, is evidence of a valid subsisting debt.

The pro forma decree reversed and cause remanded with mandate that there be a decree for the orator according to the prayer of the bill unless the defendants, within a time to be fixed by the Court of Chancery, pay to the orator the sum remaining due upon said note with costs.

BENNINGTON COUNTY,

FEBRUARY TERM, 1892.

PRESENT: ROSS, Ch. J., TAFT, MUNSON AND THOMPSON, JJ.

MAJOR W. POTTER ET AL *v.* LEANDER D. THOMPSON.

Rule of reference. Amendment to report to give jurisdiction. Presumption in favor of report.

1. Where a rule of reference issued under R. L. ss. 990–992 is returned to the County Court with a finding for the defendant in a sum less than $40, and with nothing to show that the matters submitted exceeded that sum, the County Court is not necessarily deprived of its jurisdiction, but may re-commit the report for a further finding that the matters submitted did exceed that sum.

2. Upon the re-commitment of a report for such further findings no notice to the parties of further hearing is necessary, for no further hearing is contemplated.

3. The docket entry showed that the report was re-committed for further hearing. *Held*, that so long as the report was accepted and judgment entered upon it, it must be presumed that the amendment answered the purpose of the re-commitment, and that if counsel were led by the form of the entry to expect a notice of further hearing, the relief would be in the County Court.

4. The parties cannot enlarge the scope of a rule of reference like the above by an agreement among themselves at the time of the hearing.

5. The referees attached to their report the accounts of the parties for the purpose of showing that the matters submitted exceeded $40. The

account of the defendant was against but one of the plaintiffs, whereas the finding of the report was against the plaintiffs jointly. *Held*, that this state of things would not vitiate their report, for it would be presumed that there was evidence before them tending to show a joint liability.

Report of referees appointed under R. L. ss. 990–992. Heard at the December term, 1890, Taft, J., presiding. Judgment for the defendant upon the report. The plaintiffs except.

The rule of reference was issued by a justice of the peace pursuant to due application and was as follows:

"Whereas, Major W. Potter, Jane C. Potter, his wife, and Milton Potter of Williamstown, Berkshire County, Massachusetts, of the one part, and Leander D. Thompson of Pownal aforesaid of the other part, have mutually agreed in writing, said agreement having been placed on file in my office, to submit by rule of court agreeably to the statute in that case made and provided all controversies, disputes and demands of every name or nature to the determination of you, the said Daniel Francis Bates, Daniel A. Dean and Marcus A. Dunn, and that you the said Daniel Francis Bates be chairman, that you appoint the time and place of meeting and notify the parties, but if the parties do not appear on due notice that you the said Daniel Francis Bates, Daniel A. Dean, and Marcus A. Dunn proceed *ex parte* and that the decision of a majority of you shall be final. And whereas the said Major W. Potter and Jane C. Potter, his wife, and Milton Potter have made application in writing under their hands of this date to me A. G. Parker, one of the justices of the peace for the county of Bennington, that I make the same a rule of my court.

I do therefore hereby authorize and empower you the said Daniel Francis Bates, Daniel A. Dean and Marcus A. Dunn to proceed as referees between the said parties agreeably to the rule aforesaid and to cause the report made by you in writing under the hands of those of you who shall agree, if returnable before a justice, to be returned to me at my office in Pownal in the county of Bennington aforesaid on the 8th day of April, A. D. 1890, at 10 o'clock in the forenoon to which time and place this court will stand adjourned, for the purpose of receiving said report and rendering judgment thereon, according to law or if returnable before the County Court those of you who shall agree shall cause the report by you made in writing under your hands to be

returned to the County Court next to be holden at Manchester within and for the county of Bennington on the first Tuesday of June, A. D. 1890. Given under my hand at Pownal this 28th day of February, A. D. 1890."

The referees reported that upon the hearing the following agreement was made:

"It was agreed upon by counsel for plaintiffs and defendants that all the claims, demands and causes of and for actions of the plaintiffs against the defendant should be treated as a whole and entire matter and not as if in separate suits and matters and that the referees should so consider said matters."

The remaining facts appear in the opinion.

Sheldon & Cushman, for the plaintiffs.

The parties could not at the hearing vary the terms of the rule of submission. *Lazelle* v. *Houghton*, 32 Vt. 579.

Thomas H. Hall, for the defendant.

The opinion of the court was delivered by

MUNSON, J. The rule in this case was issued under the provisions of R. L. 990-992, in pursuance of an agreement between Major W. Potter, Jane C. Potter and Milton Potter, of the one part, and Leander D. Thompson, of the other part, for the reference of all matters in dispute between the parties. At the time of the hearing it was agreed that the claims of the parties of the first part, the plaintiffs, against the party of the second part, the defendant, should be treated as one entire matter. The referees found for the defendant to recover of the plaintiffs, in full of all matters in dispute between the plaintiffs and the defendant, a balance of less than forty dollars, and made return of this finding to the County Court, but with nothing to show that the matters submitted to them exceeded forty dollars. Upon a recommitment of the report the referees stated that the matters submitted exceeded the sum named, and attached to their report copies of the accounts presented by both parties. The report thus amended was returned to the term in which it was originally

filed, and the case was thereupon continued to the next term, when final judgment was rendered.

We see no irregularity in the re-commitment or subsequent proceedings of which the plaintiffs can take advantage. The fact that the report as originally returned failed to contain the finding upon which the jurisdiction of the County Court depended, did not deprive that court of all power over it. It was competent for the court to permit the defendant to procure an amendment showing that it had jurisdiction, before taking final action upon the report. See *Whitcomb* v. *Davenport's Est.*, 63 Vt. 656. It is true that according to the docket entry the report was re-committed for further hearing, and that the amendment fails to show that any notice of further hearing was given, or that further hearing was had. But the amendment was one that could be made without further hearing, for it contains only a statement of what had been done at the hearing regularly had; and this action of the referees must be presumed to have satisfied the purpose of the re-commitment, notwithstanding the form of the docket entry, for the County Court accepted the report as thus amended, and rendered judgment upon it. If the plaintiffs' attorneys were led by the form of the docket entry to expect a notice of further hearing before a return of the report, and so failed to notice the re-filing and seasonably except to the report, this will not entitle them to any relief here. It can hardly be supposed, however, that the plaintiffs' failure to file exceptions to the report resulted solely from a misapprehension of this character, for if the plaintiffs' attorneys had asked leave to file exceptions at any time before judgment, it would clearly have been within the discretion of the court to permit it, notwithstanding the rule. See *Prior* v. *Wilbur*, 63 Vt. 407.

But the plaintiffs insist that in returning the accounts presented by the parties the referees have shown that their entire action was concerning matters not covered by the submission. It would appear from the accounts themselves that the matters pre-

sented against the defendant were the several claims of the plaintiffs, and that the matters presented by the defendant were charges against one of the plaintiffs alone. It is certain that the agreement between the parties, which the referees have embodied in their report, cannot affect the proceedings. *Lazell* v. *Houghton*, 32 Vt. 579. But the plaintiffs cannot claim to have been injured by this attempt to give additional scope to the reference, for the agreement did not purport to enlarge the right of the defendant, and in so far as the individual claims of the plaintiffs may have been allowed under its provisions, the balance found in favor of the defendant was reduced. But if the account presented by the defendant was not within the scope of the rule, no judgment can be rendered on the report.

The referees found for the defendant to recover of the plaintiffs the balance reported in full of all disputes between the plaintiffs and the defendant, but made no report of the facts upon which their finding was based. It is evident that they attached the accounts to their supplemental report only to show that the matters presented for their consideration exceeded the jurisdictional limit, and not as presenting in full the grounds of their decision. We think the mere return of an account in this form, under these circumstances, should not be held to control the general finding of the referees. It was not impossible for the referees to properly hold all the plaintiffs liable upon the account presented. The form of a charge is not conclusive as to the person to whom the credit is given. *Scott* v. *Shipherd*, 3 Vt. 104; *Goodrich* v. *Drew*, 10 Vt. 137. As the record stands, this court must presume that the referees had evidence before them which in their judgment established a joint liability, and cannot presume that their conclusion was the result of any misapprehension as to the legal effect of that evidence. It is well settled that the proceedings of referees will be presumed to be correct until the contrary is made to appear. *Stevens* v. *Pear-*

son 5 Vt. 503; *Learned* v. *Bellows*, 8 Vt. 79; *White* v. *White*, 21 Vt. 250; *Martin* v. *Wells*, 43 Vt. 428; *Thompson* v. *Warner*, 62 Vt. 186.

Judgment affirmed.

MERRITT F. RUDD *v.* JAMES H. ROUNDS.

Declarations of the wife in suit for alienation of her affections. Previous cruel treatment by husband. Conduct of counsel reversible error. Rule of damages.

1. The action being for the alienation of the affections of the plaintiff's wife whereby she was induced to and did abandon the plaintiff and refuse to live with him, the defendant may show what the wife said when leaving her husband's house, and while on her way to the house where the defendant was stopping some eight miles distant, and to the defendant upon arriving there, when he advised her to return to her husband, for all this is a part of the *res gestae*.

2. He may also show that the wife had become embittered towards the plaintiff before this in consequence of his cruel treatment of her, and had entered a complaint against him for an assault upon her.

3. Also that the wife's mother had written the plaintiff a letter accusing him of ill treating her daughter, that the plaintiff made no reply to this, and after receiving it refused to speak to the mother.

4. The plaintiff was properly permitted to testify that on several occasions he invited his wife to go to the village with him, and that she refused and afterwards went with the defendant.

5. The defendant proposed to ask the plaintiff on cross-examination, "Didn't you tell her, your wife, that you were using oil of cubebs for a trouble you had," referring to the claim of the defendant that the plaintiff had contracted a bad disorder in a house of ill fame. *Held*, rightly excluded as calling for immaterial matter.

6. It is reversible error if counsel, after a letter has been excluded, persists, against the objection and exception of the other side, in offer-

ing the separate parts of it in such a way as to get its contents before the jury.

7. In an action for the alienation of the wife's affections, the value of the wife's services is not the true rule of damages.

Case for the alienation of the affections of the plaintiff's wife. Plea, the general issue. Trial by jury at the December term, 1891, Tyler, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The evidence of the plaintiff tended to show that he and his wife were married in 1873 and had lived "happily enough" together previous to the time when the defendant came to the plaintiff's house to board, in August, 1889; that from this time on his wife began to treat him with coolness, later ceased to cohabit with him, and finally on the 23d of June, 1890, left his house altogether. The defendant had ceased to board at the plaintiff's house in April, 1890, and in June of that year was living at the house of one Mr. Barney in Shaftsbury, about eight miles distant from the plaintiff's house.

The testimony of the defendent tended to show that the plaintiff was a very intemperate man and at times treated his wife with great cruelty; that on one occasion he visited a house of prostitution in Troy, N. Y.; that he was frequently away late at night, and at times would return intoxicated and beat his wife, for which a complaint and warrant were issued; that she had on two or more occasions left the plaintiff on account of his cruel treatment of her before the defendant became acquainted with her.

On cross-examination of the plaintiff the defendant's counsel asked him if he had not contracted a bad disorder while visiting a house of ill fame, which the plaintiff denied. The plaintiff was then asked the following question: "Didn't you tell her, your wife, that you were using oil of cubebs for a trouble that you had?" which the court excluded under the defendant's exception.

The plaintiff was permitted to testify, subject to the defendant's exception, that he had asked his wife to go to the village with him on different occasions when she refused to go with him, and afterwards went with the defendant.

It appeared that on the 23d day of June, 1890, the plaintiff's wife left her home and went to Mr. Barney's; that she then bore marks of violence about her face and arms, and that the defendant advised her to return home. The defendant offered to show that on that day she expressed to him fears of bodily injury from her husband, representing that the bruises she then bore had been inflicted by him and that she declined to follow his advice. This testimony was excluded under the exception of the defendant.

The defendant introduced one Elijah Rudd, the father of the plaintiff's wife, who testified that on the 23d day of June his daughter came to his house from the plaintiff's house, a distance of about one-half mile; that she was nervous and excited, and that her face, arms, and shoulder were discolored. The defendant offered to show by the said Elijah, that immediately upon arriving at his house, his daughter charged that her husband had inflicted the bruises upon her and that she was in fear of further violence and dare not remain at the plaintiff's house. The defendant further offered to show that a short time before, the plaintiff's wife had entered a complaint to the town grand-juror against the plaintiff for an assault made upon her by him. All this evidence was excluded under the exception of the defendant.

The defendant further offered to prove by the deposition of Jane Rudd, the mother of the plaintiff's wife, that her daughter had previously to June 23d, 1890, repeatedly come to her with bruises and other marks of violence upon her person and complained that they had been inflicted by her husband, and that this was previous to her acquaintance with the defendant; that her daughter had stated to her that she could not endure this

treatment much longer. Further, that the deponent had written to the plaintiff a letter sometime in the year 1888, complaining of this ill treatment to which the plaintiff had made no reply; and that after receiving the letter the plaintiff refused to speak to her.

The plaintiff testified that he had found in a certain bed in his house a letter written by his wife and addressed to the defendant; but there was no evidence tending to show that this letter had ever been seen by the defendant or that he knew any part of its contents. The plaintiff's counsel offered this letter in evidence, but the court, after examining it, excluded it. The plaintiff's counsel afterwards persisted in offering certain parts of the letter in evidence, and in reference to what took place, the exceptions were as follows:

"The plaintiff was permitted to prove that while the defendant was boarding in his house the defendant was known and called 'Jim' as showing who was meant by the two first words of the letter, 'Dear Jim.' After the letter was excluded the plaintiff's counsel, under objection and exception by the defendant, which exception was allowed by the court, holding the letter in his hand in the presence and hearing of the jury said: 'I can see that there are some points of this letter that might not be admissible perhaps; but I now offer that part of the letter which expresses her affection for the person to whom she writes the letter.'"

By the Court:

"It seems to me that the exclusion of this letter would exclude every part of it."

By Mr. Batchelder;

"I offer this to show the wife's feelings for the person to whom this letter is addressed and to show her mental condition; but not to show that the defendant was guilty; but, we offer that part of the letter which shows the wife's feelings and affections. I offer to show that the person to whom it is addressed of that name was the name by which this defendant while boarding and while in the family of this plaintiff was addressed by the wife. It was 'to Jim,' and I offer to show that she used that name and used to call him by that name."

By Mr. Martin:

"The defendant will concede that the letter was addressed to the defendant."

By Mr. Batchelder:

"I want the further concession—this is not the defendant's name—the letter uses another name—and I want to show that the wife was in the habit of calling the defendant the name used in this letter when she was with him and in the house before the family."

By the Court:

"You are probably content with Mr. Martin's concession that the person addressed was the defendant."

By Mr. Batchelder:

"No, I am not content with it at all, only so far as it goes."

By the Court:

"Now you offer to show that this was the name by which she used to call him."

By Mr. Batchelder:

"I had rather prove it by the witnesses as it is evidence anyway."

By Mr. Martin:

"It is conceded that the defendant's name was James Rounds and that Mrs. Rudd was in the habit of calling him Jim."

By Mr. Batchelder:

"Now I offer to prove so much of this letter as shows the state of her affections for the person to whom it was addressed."

Court excludes the evidence.

By Mr. Batchelder:

"Now I offer this letter to show that the defendant is the person to whom her affections were attached at the time it was written."

Court excludes the evidence.

By Mr. Batchelder:

"Now I offer that part of it"—interrupted, exceptions by the defendant to the use Mr. Batchelder is making of this letter

and the stating of the contents before the jury, which exception is granted by the Court.

Mr. Batchelder:

"In the first place I want the date of this letter to appear and I offer to show that the letter is dated June 23, 1890."

By the Court:

"The date of the letter is proper to appear."

By Mr. Batchelder:

"Now I want to offer again and especially just this part of the letter and the words and have them appear on the records of the reporter."

Interrupted. Objections by defendant.

By Mr. Batchelder:

"I want to offer these words of endearment on the second page which I propose to have the reporter take down."

By the Court:

"Mr. Batchelder, we exclude the letter in whole and in each and every part."

By Mr. Batchelder:

"I understand this, and we offer each and every sentence by itself that is excluded."

To each and every offer of the plaintiff's counsel, after the first exclusion of the letter, the defendant's counsel seasonably objected and excepted and also seasonably objected and excepted to the statement by plaintiff's counsel in the presence of the jury of any of the contents or substance of the letter.

The Court charged the jury that if they found the plaintiff was entitled to recover, the measure of damages would be the value of the services of his wife, to which the defendant excepted.

C. H. Darling, for the defendant.

The plaintiff should not have been permitted to testify to conversations between himself and his wife. Greenl. Ev. ss. 254, 334; Phillips Ev. p. 81; Best Ev. ss. 180, 586; 2 Kent Com. 178; Sch. Dom. Rel. s. 53; *Ratcliff* v. *Vandervoort et al*,

9 N. Y. 153; *State* v. *Phelps*, 2 Tyler, 374; *Manchester* v. *Manchester*, 24 Vt. 649; *Smith* v. *Potter*, 27 Vt. 304; *Cram* v. *Cram*, 33 Vt. 15; *Sargeant* v. *Seward*, 31 Vt. 509; *Carpenter* v. *Moore et ux*, 43 Vt. 391.

The defendant should have been permitted to show the representations and declarations made by the wife on the day she left the plaintiff's house. These were a part of the *res gestae*. *Phillip* v. *Squire*, Peake Nisi Prius 82; *Barnes* v. *Allen*, 1 Keyes, N. Y. 390; *State* v. *Howard*, 32 Vt. 380; *Nash* v. *Doyle*, 40 Vt. 96; *Danforth* v. *Streeter*, 28 Vt. 490; *Hadley* v. *Curtis*, 8 N. H. 40; *Sissions* v. *Little*, 9 N. H. 271; 1 Phillip Ev. p. 82; 2 Phillip Ev. p. 212; Add. Torts., D. & B.'s Ed., p. 1084–5; *Barnes* v. *Allen*, 1 Keyes, N. Y. 390; *Hadley* v. *Haywood*, 121 Mass. 236; *Dance* v. *McBridge*, 43 Iowa 624; *Shattuck* v. *Hammond*, 46 Vt. 466.

He should also have been permitted to show the complaint made by the wife to the grand-juror and the state of feeling between the husband and wife before her acquaintance with the defendant and from time to time afterwards and what occasioned this state of feeling. *Quinn* v. *Quinn*, 16 Vt. 426; *Fenno* v. *Weston*, 31 Vt. 345–352.

The conduct of counsel in reference to the letter was reversible error. *Rea* v. *Harrington*, 58 Vt. 181; *Hall* v. *Jones et al*, 55 Vt. 297; *State* v. *Meader*, 54 Vt. 126 and cases there cited; *Cartwright* v. *State*, 8 Tex. App. 416; *People* v. *Dane*, (Mich.) 26 N. W. Rep. 781.

The value of the wife's services was not the measure of damages. No. 240 Acts of 1884; No. 84 Acts of 1888; *Wright et ux* v. *Burroughs*, 61 Vt. 390 and 62 Vt. 264; *Story et ux* v. *Domey et ux*, 62 Vt. 243.

Sheldon & Cushman, and *Batchelder & Bates*, for the plaintiff.

The declarations of the wife charging the plaintiff with personal violence at the time she left his house were inadmissible.

Worden v. *Powers*, 37 Vt. 619; *State* v. *Davidson*, 30 Vt. 377; *Downer* v. *Strafford*, 47 Vt. 579; *State* v. *Carleton*, 48 Vt. 636.

The opinion of the court was delivered by

ROSS, Ch. J. This is an action brought to recover damages for an alienation of the affections of the plaintiff's wife and thereby causing her to leave him. The wife's state of mind and regard for the plaintiff at the time she became acquainted with the defendant, and during the time of that acquaintance, until she left the plaintiff, and if there was a change during that period, whether caused by the conduct of the plaintiff, or the wrongful conduct of the defendant, were proper subjects of inquiry and investigation. The condition of her mind in regard to her husband, and what caused it to change from time to time, could be ascertained by her acts and conduct towards the plaintiff and defendant respectively, and by their acts and conduct towards her, and by her and their expression of their respective mental state towards and for each other, and of the causes therefor. The nature of the suit and what was involved in its solution, opened a broad field of inquiry and investigation. The wrongful alienation of her affection by the defendant, resulting in her leaving, and refusing to live with the plaintiff, as his wife, constitutes the gist of the action. Her leaving and refusal bore upon whether her affections had been alienated from some cause, and if caused by the wrongful conduct of the defendant, upon the amount of damages recoverable. What she said concurrent with, and while she was leaving the plaintiff's house, and on her way to the house where the defendant was stopping, and when she had reached there, and her refusal at the request of the defendant, to return to her husband, characterizing and giving the reason for her leaving, and refusal to return, were a part of the *res gestae* of the leaving and refusal to return, and admissible in evidence. *State* v. *Howard*, 32 Vt. 380; *Hadley* v. *Carter*, 8 N.

H. 40. The latter case was for enticing away a servant, and quite analogous, in principle. Her leaving was not fully accomplished until she had reached the house where the defendant was stopping, and refused, on his advice, to return to the plaintiff. What she gave as her reason for leaving, to the defendant, to her father and mother, gave character to the act she was then performing, and should have been received in evidence. These declarations were concurrent with and a part of the act, of which the defendant complained. They were made before this suit was, or could have been, in contemplation. As announced by Redfield, J. in *Danforth* v. *Streeter*, 28 Vt. 490: "The jury were to judge * * * whether the declarations were made *bona fide*, or were a mere ruse to get up evidence upon his own behalf, or for some other intended purpose." We observe nothing in that part of the mother's deposition excluded which we think was inadmissible. The defendant had the right to show what the wife, when exhibiting wounds and bruises claimed to have been inflicted by the plaintiff, said of their effect upon her feelings towards the plaintiff. The occasions were either shortly before, or during her acquaintance with the defendant. *Gilchrist* v. *Bale*, 8 Watts 355 (34 Am. Dec. 469). That the plaintiff made no reply to the mother's letter accusing him of personal abuse of his wife and of his changed manner thereafter towards the mother, were circumstances bearing upon the truth of the accusation. As mother, she had the right to inquire in regard to the plaintiff's treatment of her daughter. Naturally he would have replied and denied the accusation, if false. The fact that she complained of, and caused the plaintiff to be prosecuted just before she left was admissible to show that the abuse had so far weaned her affection for him that she was willing to subject him to prosecution. There was no error in excluding the inquiry put to the plaintiff on cross-examination. The court are not judges of *materia medica*. As put, the question called for immaterial matter.

Whether the plaintiff invited his wife to go to the village with him, and she declined and afterwards went with the defendant, did not involve a matter of marital confidence. Such invitations between husband and wife, usually, are given and declined publicly. They are not usually secret, but ordinary, open communications. They neither require, nor are inspired by marital confidence. We cannot presume they were on this occasion. The fact that the wife was more attentive to the defendant, than to the plaintiff, also that the plaintiff protested to her against the defendant being with her so much, were properly admitted.

We have not been furnished with a copy of the wife's letter addressed, but not sent, to the defendant, which was excluded by the court. We do not consider whether any portion of it was admissible. The question of the admissibility of the letter or any portion of it is not properly before us. The persistent efforts of the plaintiff's counsel to place the contents of the letter before the jury after it had been excluded were very reprehensible. When allowed, as it was, against the objection and exception of the defendant, on the case as made up, it was reversible error, that could only be cured by showing that the letter was legally admissible. But conceding that the court erroneously excluded the letter, such fact furnishes no excuse for the conduct of the plaintiff's counsel. His conduct may have been occasioned by indiscreet zeal, and the spur of the occasion, and have been regretted as soon as it was over. Yet counsel should never permit their zeal, or the excitement of the occasion to carry them beyond the proprieties of practice.

We do not think that the value of the services of his wife, was the true measure of the plaintiff's damages. He was legally entitled to her service and marital consort. But these rights were also burdened with the obligation to clothe, support, cherish and care for her, in sickness, as well as in health. The rule given is too broad and unlimited.

Judgment reversed and cause remanded.

Margaret A. Parker *v.* Merritt E. Burgess and John Burgess.

MARGARET A. PARKER *v.* MERRITT E. BURGESS AND JOHN BURGESS.

Demurrer. Meaning of the word premises in pleading. Allegation of time and place carried forward. Joint action against master and servant. Certainty to a common intent.

1. Where a count in trespass is entitled "In a plea of the case," such defect cannot be reached by demurrer.
2. The word "premises" as used in pleadings refers to what has been already set forth, and the phrase "by means of the premises" is equivalent to by means of what has been previously detailed.
3. An allegation that the plaintiff was obliged to lay out large sums in curing herself of the injuries inflicted by the defendants, is in effect an allegation that she did lay out said sums.
4. Where one clause contains an allegation of place and time, that allegation will be treated as carried into a second clause connected with the first by the conjunction and.
5. A demurrer only reaches those parts of a count which are essential to the action, and wholly immaterial allegations may be stricken out.
6. When language taken in its natural sense can convey no other meaning than that claimed for it by the pleader, it is certain to a *common intent*, and that is sufficient for the allegations in a declaration.
7. *Held*, that the second count alleged in a manner certain to a common intent that the injury to the plaintiff was the indirect and consequential result of the negligence of both of the defendants, and that therefore the action was properly brought against the two jointly.

Trespass and trespass on the case. Heard at the December term, 1891, Tyler, J., presiding, upon the defendants' special demurrer to the declaration. The demurrer was overruled and the defendants excepted.

Margaret A. Parker *v.* Merritt E. Burgess and John Burgess.

The declaration was in two counts and was as follows:

"In a plea of the case; for that the said defendants, Merritt E. Burgess and John Burgess on the 14th day of January, A. D. 1891, with force and arms, to wit: a sleigh which the said defendants were then and there driving along the highway, drove with great force and violence upon and against a certain and other vehicle, to wit: a certain sleigh of her, the said plaintiff Margaret A. Parker, of great value, to wit: of the value of twenty dollars, and in which said sleigh, she the said plaintiff, was then riding in and along said highway, and thereby then and there greatly broke to pieces, damaged and spoiled the said sleigh of the said plaintiff.

And by means of the premises, she the said plaintiff, was then and there cast and thrown with great force and violence from and out of said sleigh, to and upon the ice and ground, and by means of the premises, she the said plaintiff was afterwards, to wit: on the 14th day of January, A. D. 1891, forced and obliged to, and did necessarily lay out and expend a large sum of money, to wit: the sum of five dollars in and about the repairing and amending the damages so done to the said sleigh as aforesaid; and also by means of the premises she the said plaintiff then and there dislocated one shoulder and became and was greatly bruised, hurt, and wounded, and sick, sore, lame,and disordered in and about her limbs and arms and especially about her sides and back and abdomen, and so remained and continued for a long space of time, to wit: for the space of three months the next following and during all that time suffered and underwent great pain, and was hindered and prevented from performing and transacting the lawful affairs and business by her during that time to be done, performed and transacted (and at the date of the purchase of this writ has not recovered if she ever does) and was also thereby forced and obliged to pay, lay out, and expend, divers sums of money, to wit: the sum of one hundred dollars in and about endeavoring to be cured of the sickness, soreness, lameness, disorder and injuries aforesaid, occasioned as aforesaid, to wit: at Bennington, aforesaid, and other wrongs and enormities to the said plaintiff, the said defendants then and there did against the peace and to the damage of the plaintiff, as she says one thousand dollars, for the recovery of which with just costs this suit is brought.

And also in a further plea of the case for the same cause of action; for that whereas the plaintiff Margaret A. Parker, on the 14th day of January, A. D. 1891, at Bennington in the county

of Bennington aforesaid owned and was possessed of a certain vehicle, to wit: a sleigh of the value of twenty dollars and of a certain horse, which was then and there harnessed to said sleigh; and that plaintiff was then and there sitting and riding in said sleigh, so harnessed, in a certain public highway in the village of Bennington in the town of Bennington, there called Main Street.

And whereas, there on the same day the said defendant Merritt E. Burgess owned and possessed a certain vehicle to wit: a sleigh and also a horse driving the same through and along said street.

And the said defendant John Burgess was then and there the minor son and servant of the said defendant Merritt E. Burgess and then and there had the care, government and management of the said vehicle or sleigh and horse of the said Merritt E. Burgess and was then and there acting about the business, in the employment and under the direction of the said Merritt E. Burgess.

Yet the said defendants Merritt E. Burgess and John Burgess not minding nor regarding their duty in this behalf, then and there so negligently and unskillfully managed and behaved themselves in this behalf, and so ignorantly, carelessly and negligently drove and managed, guided and governed said vehicle or sleigh and horse, and by furiously driving said vehicle or sleigh and horse, that the said vehicle or sleigh of the said Merritt E. Burgess for want of good and sufficient care and management thereof and the horse then and there driving the same as aforesaid, and by furious driving, then and there struck against the said sleigh of the plaintiff with such force and violence, that the said sleigh of the plaintiff, wherein she was then sitting and riding as aforesaid, was thereby overset, broken to pieces and greatly damaged, and the plaintiff thrown with great force and violence from and out of her said sleigh upon and against the ice and ground, so that thereby her left shoulder was dislocated, and thereby her limbs, arms and particularly her sides, back and abdomen greatly lamed, bruised, injured, made sore and lacerated and her life endangered. And by means of the premises the plaintiff became sick, sore, lame, weak and disabled and confined to her bed and unable to put on and take off her clothes, and so remained for a long space of time, to wit: for the space of three months then next following and during all that time suffered and underwent great pain and was hindered and prevented from performing and transacting her lawful affairs and business, by her during that time to be

done, performed and transacted and her health and comfort and enjoyment of life was permanently injured, and was also thereby forced and obliged to pay, lay out and expend divers large sums of money, to wit: the sum of one hundred dollars for medical attendance and in assistance to take care of herself and in and about endeavoring to be cured of the sickness, dislocation, soreness, lameness, disorders and injuries aforesaid, occasioned as aforesaid, to wit: at Bennington aforesaid."

The points raised by the demurrer are stated in the opinion.

Sheldon & Cushman, for the defendants.

The title of the first count is defective. 1 Chit. Pl. 283, 284.

The first count has not the requisite degree of certainty. 1 Chit. Pl. 257, 259; *Dovaston* v. *Payne*, Sm. Ld. Cas. 201; 1 Chit. Pl. 233, 261.

The second count is in effect a declaration in case against Merritt Burgess and in trespass against John Burgess. *Day* v. *Edwards*, 5 T. R. 648; *Savignac* v. *Roome*, 6 T. R. 125; *Weston* v. *Woodcock*, 7 Dowl. 853; 5 M. & W. 758, S. C.; *Scott* v. *Shepard*, Smith's Lead. Cas., 6th Am. Ed., 693.

C. H. Darling, for the plaintiff.

An error in the title of a count is not demurrable. 1 Chit. Pl., 2 Ed., p. 662; Id. 254.

The allegations in the first count are properly laid. *Royce* v. *Maloney*, 58 Vt. 437; *Folsom* v. *Underhill*, 36 Vt. 580; *Grimes* v. *Gates, et ux*, 47 Vt. 594; *Underhill* v. *Welton*, 32 Vt. 40; *Hutchinson* v. *Granger*, 13 Vt. 386; *Lindsey* v. *Danville*, 46 Vt. 144–150.

The opinion of the court was delivered by

ROSS, Ch. J. I. The first count of the declaration is a count in trespass. It is entitled "a plea of the case." This defect is not reached by a demurrer. 1 Chit. Pl. pp. 254, 283, 663. It may be the ground of a motion to set aside the declaration for irregularity.

II. The defendants contend that the clause in this count, "by means of the premises, she the said plaintiff then and there dislocated one shoulder" is demurrable, as charging an injury done by the plaintiff, and not by the defendants, and for vagueness, and indefiniteness, and meaninglessness, without the aid of an inference not expressed. It is true the allegations in a plea are to be taken most strongly against the pleader. Yet they are to be taken as a whole and fairly. The contention in respect to by whom the injury was occasioned, would be well taken, if it had not omitted the qualifying phrase "by means of the premises." Premises are what has already been stated and set forth in the count. Looking back to the premises, it is manifest that she dislocated one shoulder through the defendants' wrongfully driving their sleigh against the sleigh of the plaintiff, and thereby throwing her, with great force and violence upon the ice and ground. The whole clause fairly charges the dislocation upon the fault of the defendants. When the pleader says "by means of the premises," or fault of the defendants already set forth, "she dislocated one shoulder," he gives the defendants fairly to understand that he means one of the plaintiff's shoulders. It is altogether too fanciful and speculative to claim the pleader may mean the shoulder of her horse, or the shoulder of her sleigh.

III. The demurrants farther contend that the clause "and was also thereby forced and obliged to pay, lay out and expend divers sums of money, to wit: the sum of one hundred dollars in and about endeavoring to be cured of the sickness, soreness, lameness, disorder and injuries aforesaid, occasioned as aforesaid," is insufficient, because it lacks an allegation of time, which is necessary in every traversable allegation. But the conjunction "and," connecting this sentence closely to the next preceding sentence, in which there is a proper allegation of time and place, brings that allegation into this clause, as a part of it. *Royce* v. *Maloney*, 58 Vt. 437. He further contends, that there

is no allegation that the plaintiff did pay out and expend the sum named. We think the allegation, that she was "*forced and obliged to pay, lay out and expend*" etc., is equivalent to alleging that she did pay, lay out and expend. It was the legal duty of the plaintiff carefully to heal and cure the injuries wrongfully inflicted upon her by the defendants. The damages set forth in this clause of the count are the common and ordinary consequences of the injury complained of, recoverable without being specially alleged. *Hutchinson* v. *Granger*, 13 Vt. 386. A good cause of action for the recovery of these damages would be contained in this count of the declaration, if this clause were treated as surplusage. Wholly immaterial allegations may be ordered stricken out, but are not demurrable. A demurrer properly reaches the substance only, or what is essential to the action. 2 Chit. Pl. 661.

These are all the defects in the first count now relied upon under the special demurrer.

IV. The second count is denominated a count in case for the same cause of action. Trespass and case may be joined. This is authorized by statute R. L. 912. This count declares that the plaintiff on the occasion owned a sleigh and horse, and was riding in the sleigh drawn by the horse, on a public highway; that the defendant, Merritt E., owned also a horse and sleigh which were being driven along the same highway by the defendant, John Burgess, a son and servant, acting in the business, employment and under the direction of defendant, Merritt E., and that the defendants, not minding their duty, so negligently, and unskillfully managed and behaved themselves, so ignorantly, carelessly and negligently drove, managed, guided and governed. the sleigh of Merritt E., that, for want of good and sufficient care and management, and by furious driving, it struck against the sleigh of the plaintiff and caused the damages complained of. This is the substance of what is set forth in the second count. We think this is a count in case for the negligent

act of the defendant John, for whose act the defendant Merritt E. by relation,—whether he was in the sleigh with his son at the time of the accident or not,—was also responsible. If the accident and injury were the indirect or consequential result of the negligent act of defendant John, then the action may be maintained against both defendants, but if the direct and immediate result of his negligent act, the action in this form may be maintainable against Merritt E. only. That will depend upon the proof. The count declares for the indirect and consequential result of the negligent act of both. It does not declare for the direct and immediate result of the negligent act of John, and also for the indirect and consequential act of Merritt E. It is not double as contended by demurrants. Taken as a whole the count is certain to a *common intent.* We think the language used, taken in its natural sense, imports the meaning we have indicated, and any other meaning must be made out by argument or inference. When this is the case, the natural sense shall prevail and the count, in this kind of action, will be held sufficient. 1 Chitty Pl. s. 233. The demurants' other objections to this count are, either the same objections already considered put in another form of phraseology, or such as have been considered, in regard to the first count.

Judgment affirmed and cause remanded.

DYER P. SISSON *v.* DAVID S. NILES.

Limitation of actions. Absence from the State.

1. Questions as to the limitation of actions are determined by the law of forum.
2. The provision of R. L. s. 970 that absence of the defendant from the State may interrupt the running of the statute, applies only to absence from the State of Vermont.

Assumpsit for goods sold and delivered. Pleas, the general issue and statute of limitations. Heard upon defendant's demurrer to the plaintiff's replication to the second plea, at the December term, 1891, Tyler, J., presiding. Demurrer sustained and judgment for the defendant. The plaintiff excepts.

The plaintiff's replication alleged that the plaintiff had always resided in the State of New York, that the debt was contracted in that State, that the defendant had been continuously absent from and had no attachable property there.

J. C. Baker, for the plaintiff.

Batchelder & Barber, for the defendant.

The statute of limitations goes to the remedy merely and is determined by the law of the place where the suit is brought. Story Conf. Laws, 794; *Graves* v. *Weeks*, 19 Vt. 178.

The opinion of the court was delivered by

MUNSON, J. The plaintiff sues in this State upon a cause of action which accrued in the State of New York. The plaintiff was, at the time the cause of action accrued, and ever since has been, a resident of New York, and the defendant has not at any time since the cause of action accrued resided in that State, or had known property therein. The plaintiff relies upon these facts to avoid the defendant's plea of the statute of limitations.

Caroline Wilcox *v.* Issac S. Moon.

Provisions of limitation pertain to the remedy, and questions of limitation are to be determined by the law of the jurisdiction where suit is brought. The modifying provision of our statute upon which the plaintiff relies, found in R. L. 970, does not cover the case presented. The clause in question must be read as applying to an absence from, and a want of property within, this State, and not to an absence from, and want of property within, the State where the cause of action accrued, if it accrued in another State. The allegations of the replication might avail the plaintiff if the suit were in New York, but they are not a sufficient answer here.

Judgment in chief reversed pro forma with costs to defendant, judgment sustaining demurrer affirmed, and cause remanded.

CAROLINE WILCOX *v.* ISAAC S. MOON.

Libel. Sending sealed letter not publication. Husband and wife.

1. The sending of a libellous communication by mail in a sealed envelope addressed to the person libelled, is not, without some additional fact, a publication of the libel, although the person addressed is a married woman.
2. A husband has no legal right to open the letters of his wife without her consent; and if she voluntarily shows him the libel that is her publication.
3. *Quere*, how it might be if the husband was in the habit of opening his wife's correspondence, and this was known to the sender.

Action for libel. Plea, the general issue. Trial by jury at the December term, 1891, Tyler, J., presiding.

The plaintiff offered to show that the libel was brought by the husband from the post-office in a sealed envelope addressed

to the wife, and was handed by him to his wife unopened; that she broke the seal, and that they read it together, standing side by side. To this evidence the defendant objected for that it did not show a publication. The court ruled that it did, to which the defendant excepted. Thereupon the court withdrew the case from the jury and passed the exception to the Supreme Court before final judgment.

J. C. Baker, for the defendant.

There was no publication. *Wilcox and wife* v. *Moon*, 63 Vt. 481; Cool. Torts, 193; 2 Add. Torts, 980; Town. Slan., s. 95; Odgers Slan., s. 150; *Lyle* v. *Clason*, 1 Cains, 581; *Sparts* v. *Poundstone*, 87 Ind. 522; *McIntosh* v. *Matherly*, 9 B. Mon. 119; *Broderick* v. *James*, 3 Daly 481; *Desmond* v. *Brown*, 33 Iowa 13; *Sheffill* v. *Van Duzen*, 13 Gray 304; *Hastings* v. *Stetson*, 126 Mass. 329; 2 Greenl. Ev. s. 414; *Phillips* v. *Jansen*, 2 Esp. 624.

Waterman, Martin & Hitt, for the plaintiff.

When the defendant sent this libel into the world beyond his control by depositing it in the mail, he was guilty of a publication. *King* v. *Burdett*, 6 E. C. L. 375; *Rex* v. *Broderick*, 14 Irish Law Rep. 453; Town Sl. and Lib. s. 101; Folk. St. Sl. s. 252 and note to s. 535; also s. 528; *Miller* v. *Johnson*, 76 Ill. 58.

The opinion of the court was delivered by

TAFT, J. When this case was before the court at the February term, 1891, Munson, J., in the opinion said, "It is true that a communication to the plaintiff wife by a letter so transmitted as not to be seen by others would not be such a publication as would sustain an action." 63 Vt. 481. To entitle the plaintiff to recover, publication to some third party must be shown, and so, sending a libellous letter to the plaintiff, who received it unopened is no evidence of publication. The gist of the action is the injury to the plaintiff's reputation, which consists

in the good opinion of her fellow citizens. If third persons have no knowledge of the libel, she has sustained no injury to her reputation. If the defendant did not publish the libel to third parties, he has committed no wrong for which he is liable in a civil action. The defendant is not liable for a publication by the plaintiff, for it is not the defendant's act. As stated, if a man write a libellous letter and deliver it to the party himself, it is no publication; sending a sealed letter, if nothing more is shown, is the same as a delivery to the party. Sending an unsealed letter by a messenger who reads it, is evidence of a publication. Sending one to a party who cannot read, and this is known to the sender, and the party to whom it is sent, from necessity procures another to read it, is likewise evidence of a publication, so is sending such a letter to one whose clerk is in the habit of opening and reading his letters, and this habit is known to the sender, and whose clerk does in fact open and read it. These exceptions to the general rule seem to be based upon the principle that the letter is sent with the intent, on the part of the sender, that without any act of the person to whom it is sent, or from his necessity, if an illiterate person, it must or may be read by a third person. The letter in question was sealed, sent by the post, and received by the plaintiff unopened. Showing it by the plaintiff to her husband, was her own act, not that of the defendant. There was no testimony in the case tending to show knowledge in the defendant, that plaintiff's husband was ever in the habit of opening and reading the plaintiff's correspondence. In respect of the publication of a libel, husband and wife are distinct persons, and so a publication to a wife, sustains an action in favor of the husband. See 61 Vt. 484. The husband in this case had no legal right to the letter addressed to the plaintiff. In these modern days when the tendency is to regard husband and wife as distinct persons, we are not inclined to return to the ancient legal fiction regarding them as one. If the twain were one, then, when the husband read the letter, no third

person saw it, only the plaintiff herself read it. A libel sent to the wife, and shown by her to her husband is a publication by the wife, not by the sender. There was nothing in the testimony tending to show a publication by the defendant, nor that he intended the letter should, or might, be read by anyone before it reached the plaintiff's hands, or by a third person from necessity afterwards. The ruling that the facts stated would constitute a publication was erroneous, and the

Cause is remanded.

POLLY ANN NILES *v.* HENRY D. HALL.

Liability of wife's property for husband's debts.

1. How far the wife's property, or its income, shall be subject to the payment of the husband's debts, is a matter of legislative control as a part of the marriage relation.
2. The fact that the income of the wife's real estate is, at a particular period, liable for certain debts of the husband in virtue of legislative enactment, does not give a creditor, whose debt accrued during that period, any prospective interest in the future income of such sale.
3. Between 1878 and 1883 the products of the wife's real estate were by statute made liable for the husband's debts contracted for family necessaries. By the act of 1884 that liability was removed. *Held*, that a debt for necessaries contracted previous to 1884 could not be enforced against the income of the wife's real estate after the passage of the act of that year.

Replevin for a quantity of hay, corn and oats. Plea, the general issue. Trial by court at the December term, 1890, Taft, J., presiding. Judgment for the plaintiff. The defendant excepts. The opinion states the case.

Waterman, Martin & Hitt, for the defendant.

The act of 1884 should not be given a retrospective effect. Potter's Dwarris, 74, 162; *Hine* v. *Pomeroy*, 39 Vt. 211; *Starks-*

boro v. *Hinesburg*, 13 Vt. 215; *Harris* v. *Townshend*, 56 Vt. 716; 1 Kent Com. 455.

So far as it concerned past debts it was unconstitutional. *State ex rel. Ranger* v. *New Orleans*, 102 U. S. 203; *Edwards* v. *Kearzey*, 96 U. S. 595; 1 Bac. A. tit. Actions, B; *Walker* v. *Whitehead*, 83 U. S. 314; *Von Hoffman* v. *Quincy*, 4 Wall. 548; *McCracken* v. *Hayward*, 2 How. 608; *Green* v. *Biddle*, 8 Wheat. 1; *Bronson* v. *Kinzie*, 1 How. 311; *Bk.* v. *Sharp*, 6 How. 301; *Gunn* v. *Barry*, 82 U. S. 610; *Morse* v. *Gould*, 11 N. Y. R. 281; *Rue* v. *Alter*, 5 Denio 119.

Batchelder & Barber, for the plaintiff.

Save for the statute the creditors of a husband never had any interest in the property of his wife. *Richardson, Admr.* v. *Estate of Merrill et al*, 32 Vt. 27; *Richardson* v. *Waite*, 29 Vt. 536; *Porter et al* v. *Bank of Rutland et al*, 19 Vt. 412; *Bruce and wife* v. *Thompson*, 26 Vt. 741; *Cardell* v. *Ryder*, 35 Vt. 47; *Child* v. *Pearl*, 43 Vt. 224; *Dale* v. *Robinson*, 51 Vt. 30 and 31; *Hubbard* v. *Bugbee*, 58 Vt. 178.

The act of 1884 is constitutional. Cool. Con. Lim., p. 443; *Somers* v. *Johnson*, 4 Vt. 280; *Richardson, Admr.* v. *Cook et al*, 37 Vt. 600; *Watson* v. *N. Y. C. Rd. Co.*, 47 N. Y. 157; *Van Rensselaer* v. *Snyder*, 13 N. Y. 299; *Conkey* v. *Hart*, 14 N. Y. 30; *Van Rensselaer* v. *Hays*, 19 N. Y. 68; *Van Rensselaer* v. *Ball*, 19 N. Y. 100; *Garrett* v. *Cheshire*, 60 N. C. 396; S. C. 12 Am. Rep. 647; *Bell* v. *Roberts*, 13 Vt. 585; *Edwards* v. *Kearzy*, 96 U. S. 595.

The opinion of the court was delivered by

MUNSON, J. The property replevied consists of hay and grain which were grown on the plaintiff's farm in the year 1889, and which were obtained by the defendant through an execution sale had in satisfaction of a judgment recovered by him against the plaintiff's husband in 1887; the judgment being for necessaries furnished the family between the years 1878 and 1883.

During the time the defendant's account was accruing, the annual products of the wife's real estate could be levied upon in satisfaction of debts contracted by the husband for family necessaries; and the defendant insists that the clause of s. 2, No. 140, Acts of 1884, which provides that such products shall not be liable for the husband's debts, so far as any application to pre-existing demands may be claimed for it, is unconstitutional and void.

The determination of this case does not necessitate an examination of the numerous decisions concerning the constitutionality of statutes by which the valuation limit of exempted property is increased or another class of property added to a list previously exempted. The case is not governed by these decisions, but by the doctrines which pertain to the marriage relation, and to the power of the Legislature to regulate and control that relation. The property which the defendant seeks to hold on his execution against the husband is the product of the wife's land, grown after the passage of the act by which such products were relieved from any liability for the husband's debts. The defendant claims this right by virtue of a prior statute, which regulated the disposal of these annual products in a different manner. Statutes of this class rest upon the right of the State to regulate the marriage relation, and are liable to be altered whenever the good of that relation is thought to require it. It would seriously abridge this beneficent control of the State, to hold that a creditor of the husband has an interest in the prospective products of the wife's realty which cannot be taken away by legislation. Such a holding is not required by the provisions of the federal constitution. Neither the husband nor the husband's creditor has any right to the future products of the wife's real estate that is not subject to legislative control. *Baker's Executors* v. *Kilgore*, 145 U. S. 487.

Judgment affirmed.

MERRITT F. RUDD *v.* CHARLES H. DARLING.

Court may commit witness for refusing to answer. Authority issuing not liable for abuse of lawful process. Pleading.

1. Defects in matters of form cannot be reached by general demurrer.
2. The judge of the Bennington Municipal Court may imprison for contempt a witness who refuses to answer a question properly put to him in a proceeding of which that court has jurisdiction.
3. A judicial officer, acting within his jurisdiction and in a judicial capacity, is not liable in a private action for his judicial acts.
4. Where a plea in bar to the declaration alleges that the defendant "did no other act or thing" in the premises except to order the arrest and imprisonment of the plaintiff for contempt, which it justifies, this will be a complete answer to the declaration, for if the declaration alleges other trespasses than the arrest and imprisonment, this amounts to a general traverse of those allegations.
5. The authority issuing a lawful precept is not liable for an abuse in its execution, and this is true of an order to commit for contempt of court.

Trespass *vi et armis*. Pleas, the general issue and a special plea in bar. Heard at the December term, 1891, Tyler J., presiding, upon the plaintiff's demurrer to the defendant's plea in bar. The demurrer was overruled and the plaintiff excepted.

The plaintiff's declaration was in three counts, the first and second for the arrest and imprisonment, and the third for a simple assault. The defendant's plea in bar was as follows:

"That on the 16th day of November, A. D. 1889, this defendant was by the governor of the State of Vermont, duly appointed judge of the Municipal Court, in and for the village of Bennington, and as such judge this defendant was duly sworn and gave the bond required by law and on the first day of Decem-

ber, A. D. 1889, entered upon the performance of the duties devolving upon him as judge of such court, and was at the time of the committing of the said several supposed grievances, in the said several counts of the said declaration mentioned, ever since has been and still is, the judge of said Municipal Court, and lawfully exercising and discharging the powers, duties and functions that pertain to said office of judge of said Municipal Court.

That on the 1st day of July, 1890, one Joseph Hill of Bennington, was brought before said Municipal Court, by virtue of a warrant against him, the said Hill, in the name of the State of Vermont, duly issued from and out of said court, and founded on a complaint exhibited to said court by O. M. Barber, State's attorney, for the county of Bennington, charging that the said Joseph Hill, at said village of Bennington, on the 1st day of April, A. D. 1890, did at divers times, sell, furnish, and give away intoxicating liquor, without authority, contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the State.

That the crime charged against the said Hill, in and by said complaint, was within the jurisdiction of the said Municipal Court, to try and determine, and that said cause was in said court entitled the State of Vermont against Joseph Hill, that such proceedings were had in said cause by and before said court, that on the 10th day of July, A. D, 1890, the said cause was by said Municipal Court, this defendant then still being the judge thereof and as such then presiding therein, heard and determined.

That on the hearing of said cause and before the determination thereof, divers persons and among them Merritt F. Rudd, this plaintiff, were summoned as witnesses to testify what they knew relative to the said cause, then so on trial, that the said Merritt F. Rudd then and there appeared before said court and was duly sworn as a witness therein, in said cause, that the said State's attorney thereupon then and there, and after said Rudd had been duly sworn as aforesaid, and before said court, in the trial of said cause, interrogated the said Rudd as a witness, sworn as aforesaid, as to certain matters material to the issue then on trial, to wit: the cause of the State of Vermont against the said Joseph Hill; that the said Merritt F. Rudd, being then and there so interrogated, did not and would not answer said interrogatories of the State's attorney, but wilfully and contumaciously refused so to do, that the defendant as judge of said Municipal Court and not otherwise, then and there instructed said Merritt F. Rudd that said interrogatories were relevant and proper interrogatories, and material to said cause then on trial, and did direct

and order said Rudd to make answer to said interrogatories, and did then and there also instruct the said Rudd that a refusal so to do would be a contempt of said court. That thereupon said interrogatories were again by the said State's attorney, by the direction of this defendant as judge of said Municipal Court and not otherwise, put to said Rudd, as witness as aforesaid, before said court in said cause, that the said Rudd refused to obey the said direction and order of said court, and did again wilfully and contumaciously refuse to answer said interrogatories, or any of them; that thereupon this defendant as judge of said Municipal Court and not otherwise, did adjudge that the said Merritt F. Rudd, by his said wilful and contumacious refusal to answer said interrogatories, was then and there guilty of contempt of said court, and thereupon did also then and there adjudge, order and direct, that the said Merritt F. Rudd be committed to the common jail in Bennington, in the county of Bennington, until he purge himself of said contempt, by making answer to said interrogatories, and be further dealt with according to law, as it was lawful for the said defendant to do with the causes aforesaid. And this defendant did no other act or thing; that immediately thereupon, one Andrew J. Pike, then the sheriff of Bennington county, pursuant to the said order and direction of the said Municipal Court, gently laid his hands upon the said Merritt F. Rudd, and with no more force than necessary, did compel the said Merritt F. Rudd to go along the street of said village of Bennington, to and into the common jail, there then situate, and him the said Merritt F. Rudd did then and there commit to said jail, and him there did detain by virtue of said order and direction of said court as he lawfully might do for the causes aforesaid, and which are the said several supposed trespasses, in the said several counts, in plaintiff's declaration mentioned, and whereof the said plaintiff hath above complained against the said defendant."

Sheldon & Cushman, for the plaintiff.

The plea in bar does not contain an answer to all the trespasses counted on in the declaration. 1 Chitty Pl. p. 524; 1 Saund. Pl. p. 28, n. 3; Gould's Pl. 358; *Hathaway* v. *Rice*, 19 Vt. 102; *Goodrich* v. *Judevine*, 40 Vt. 190; *Ellis* v. *Cleveland*, 54 Vt. 437; *Gregory et ux* v. *Hill*, 8 Term. R. 299; *Oakes* v. *Wood*, 2 M. and W. 791.

O. M. Barber, for the defendant.

As judge of the Municipal Court, the defendant might commit the plaintiff for refusing to answer the questions put to him as a witness. *In re* Jesse Cooper 32 Vt. 253; *Village of Winooski* v. *Gokey*, 49 Vt. 285; *In re* John Percey, 2 Daley 530; *People* v. *Nevins*, 1 Hill 154; *State* v. *Matthews*, 37 N. H. 450; *State* v. *Copp*, 15 N. H. 212.

And for the exercise of this judicial authority the defendant is not liable to a private action. *Bradley* v. *Fisher*, 13 Wall. 339; *Randall* v. *Brigham*, 7 Wall. 523; *Pratt* v. *Gardner*, 2 Cush. 68; *Yates* v. *Lansing*, 5 John. 291; *Wright* v. *Hazen and Gordon*, 24 Vt. 143.

The opinion of the court was delivered by

THOMPSON, J. To the defendant's second plea, the plaintiff interposes a general demurrer. If this plea, which is to the whole declaration, sets forth in substance a full answer to the grievances alleged, it is sufficient, no matter how defective it may be in form, as matters of form are not reached by a general demurrer. To take advantage of them, the pleader must demur specially.

The Municipal Court of Bennington had jurisdiction of the subject matter, the person, and the original process, in the case of *State* v. *Hill*, referred to in this plea. In that case, the plaintiff was produced and sworn as a witness, and refused to answer certain questions pertinent to the issue, put to him, and after being admonished by the court that if he persisted in his refusal to answer, he would be adjudged to be in contempt of court, he still "wilfully and contumaciously refused" to answer the questions. This was contempt *in facie curiae*, and the defendant as judge of the court, had the authority to commit for it; indeed he would have been derelict in his duty had he not done so. In Rapalje on Contempts, sec. 66, it is said: "It may safely be laid down as a general rule, that the refusal of a witness to testify at all, or to answer particular questions pertinent

to the issue, put to him either in a proceeding before the court itself or before a subordinate officer duly empowered by the court to take his deposition or conduct his examination, is contempt of such court, provided always the court have jurisdiction of the controversy or proceeding in which the witness is required to give his evidence. If the witness be competent, and the question pertinent to the issue, he should be compelled to answer. If he perseveres in his silence, when questioned, he may be committed for contempt, and confined until he does answer. Such refusal is a contempt no matter how respectfully and deferentially it may be made." This is a correct and comprehensive statement of the law on this subject. "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers." *In re* Jesse Cooper, 32 Vt. 253.

It has been held that this power is inherent in his justices' courts as well as in the higher courts of this State. *In re* Cooper, *supra.* The Municipal Court of Bennington is declared to be a court of record by the public act creating it, and of which this court is bound to take judicial cognizance. St. 1884, No. 226 ss. 48, 74. *Winooski* v. *Gokey*, 49 Vt. 285. It also has this power to punish for contempt.

A judicial officer acting within his jurisdiction and in his judicial capacity is not liable in a private action for his judicial acts. *Banister* v. *Wakeman*, 64 Vt.; S. C. 23 Atl. Rep. 585; and cases there cited. On the allegations in this plea with reference to defendant's adjudging the plaintiff to be in contempt of court and ordering his commitment, which are admitted by the demurrer to be true, this immunity accorded to judicial officers, is a complete justification of the act of the defendant in making such adjudication and ordering the imprisonment of the plaintiff until he should purge himself of the contempt.

But the plaintiff contends that if the plea alleges a justifica-

tion of the arrest and imprisonment of the plaintiff for contempt, it does not answer other trespasses to the plaintiff which he says are charged in his declaration. In answer to this, the defendant insists that what the plaintiff characterizes as "other trespasses," are only matters of aggravation, the gist of the cause of action set forth in the first and second counts, being false imprisonment, and that in the third count, being a simple assault. It is not necessary to decide which contention is correct in order to dispose of the case. In this plea, the defendant alleges that he "did no other act or thing" in the premises, except to adjudge the plaintiff to be in contempt of court and to order his commitment therefor until he should purge himself of it, as set forth in the plea. If it is assumed that other trespasses, as claimed by the plaintiff, are alleged in the declaration, then this plea taken as a whole, sets forth a justification as to the arrest and imprisonment, and argumentatively, if not directly, pleads the general issue as to suclr other alleged trespasses. 3 Chit. Pl. [1061] form 3 note c. This in *substance*, answers the entire declaration, and is sufficient under the general demurrer. The plea alleges that what occurred to the plaintiff subsequent to the making the adjudication of contempt and order of commitment, was done by the sheriff of Bennington county in executing the order of commitment.

If this officer in executing this order used more force than was necessary or otherwise assaulted the plaintiff, or detained and imprisoned him contrary to the order of the court, the defendant is not liable for such excess of force or abuse of authority on the part of the officer. A judicial officer is not liable for the acts of a ministerial officer in executing the lawful orders or valid process issued by such judicial officer as a court. In executing an order of this kind, the officer executing it is not the agent of such judicial officer, but is simply the hand of the law the same as in any other lawful, criminal proceeding. "A con-

tempt of court is an offence against the State, and not an offence against the judge, personally." Rapalje on Contempts s. 162.

Judgment affirmed and cause remanded.

NELLIE A. DERRICK *v.* JOHN LUDDY, AP'T.

Tenant cannot dispute landlord's title. Payment of rent and occupation raises promise to pay further.

1. As a general rule the tenant cannot dispute his landlord's title, and the same rule applies to an assignee of the tenant.
2. In an action for the recovery of rent the tenant who seeks to deny the title of his landlord must show that the case falls within some exception to the general rule.
3. If the tenant recognizes the title of his landlord and pays him rent, that fact raises a promise between the parties upon which an action in general assumpsit will lie.

General assumpsit. Heard at the December term, 1891, Taft, J., presiding, upon the report of a referee. Judgment for the plaintiff. The defendant excepts.

The plaintiff claimed to recover the amount of rent due under certain perpetual leases. It appeared that the defendant bought the premises January 1, 1883, from one John A. Green, and the plaintiff introduced the deed from Green to the defendant, which contained the following clause:

"The said premises are subject to a lien of a certain annual land rent of twenty dollars, payable to Nellie Derrick, and are conveyed subject to the same." On the same day the defendant and wife signed a mortgage to Green containing this clause; "Except a certain annual land rent of twenty dollars payable to Nellie Derrick."

The defendant objected to the admission of these deeds as immaterial and for the reason that rent reserved in a sealed instrument cannot be recovered in an action of assumpsit.

Nellie A. Derrick *v.* John Luddy, *Ap't.*

The referee found that Green paid the plaintiff rent while he occupied the premises and that the defendant also paid her the rent specified until 1886.

Sheldon & Cushman, for the defendant.

Assumpsit will not lie for rent accruing under an instrument under seal. *Gaye* v. *Smith*, 14 Me. 466; *Blume* v. *McClurken*, 10 Watts, 388; 1 Chitty Pl. 106 n. 7; *Camp* v. *Barber et al*, 21 Vt. 471; *Myrick* v. *Slason*, 19 Vt. 126.

The recitals in the deed from Green to defendant and in the mortgage from defendant to Green cannot avail the defendant as an estoppel. *Wright* v. *Hazen* and *Gordon*, 24 Vt. 145; Her. Estop., s. 213, p. 233-4; *Carter* v. *Carter*, 3 K. & J. 745; *Carpenter* v. *Bullen*, 8 M. & W. 212.

Batchelder & Barber, for the plaintiff.

The defendant cannot dispute the title of his landlord. *Greene* v. *Munson*, 9 Vt. 37; Rob. Dig. p. 434 and cases cited; *Townshend* v. *Estate of Downes*, 32 Vt. 184; *Sellick* v. *Starr*, 5 Vt. 255.

The opinion of the court was delivered by

THOMPSON, J. The referee in effect finds that Weir and Green, the defendant's immediate predecessors in his chain of title, held the farm occupied by him, as tenants of the plaintiff, attorning to her therefor by the payment of an annual rent of $20 while they owned it. Greene in his deed to the defendant, dated January 1, 1883, admits that he so holds the premises in question, and declares that the defendant is to take the same charged with the same duties and relations by inserting in the deed this clause: "The said premises are subject to the lien of a certain annual rent of twenty dollars, payable to Nellie Derrick, and are conveyed subject to the same." The defendant has no title to the premises except such as he derives by virtue of this deed from Green. After taking the conveyance with full knowledge that the premises were thus charged with this rent burden

to the plaintiff, the defendant from that time, until 1886, recognized and acknowledged the plaintiff as his landlord, by attorning to her and paying her rent, *eo nomine*, to the last named year.

We think that these findings preclude the defendant from disputing the plaintiff's title as his landlord and his liability to pay her rent during the time covered by this suit. It is well settled as a general rule, that the tenant shall not be permitted to dispute his landlord's title until the tenant has surrendered the possession of the premises to him. This rule applies to the assignee of the lessee as well as to the lessee himself; and the assignee is bound by his assignor's acknowledgment of his tenancy of the premises. *Tuttle* v. *Reynolds*, 1 Vt. 80; *Reed* v. *Shepley*, 6 Vt. 602; *Greeno* v. *Munson*, 9 Vt. 37; *Hall* v. *Dewey*, 10 Vt. 593; *Steen* v. *Wardsworth*, 17 Vt. 297; *Wires* v. *Nelson*, 26 Vt. 13; *Robinson* v. *Johnson*, 36 Vt. 69; *Stacy* v. *Bostwick*, 48 Vt. 192; *Jamaica* v. *Hart*, 52 Vt. 549; *Stott* v. *Rutherford*, 92 U. S. 107; L. Ed. 23 Book 486; Taylor's Land. & Ten. (5th Ed.) ss. 705-707.

To this rule there are some exceptions. For instance, the tenant may show that the landlord's title has expired, or that the payment of rent or other act by which he has acknowledged it, was induced by fraud, or a mutual misapprehension, or by misrepresentation of the landlord's title. *Swift* v. *Dean*, 11 Vt. 323; *Orleans Co. Gram. School* v. *Parker*, 25 Vt. 703. But where the relation of landlord and tenant has been recognized and acknowledged by the tenant, the burden is upon him, in an action for the rent or to recover the possession of the premises, to establish that the case falls within some exception of the general rule stated, if he would avail himself of the right accorded him by such exception, to dispute his landlord's title. This the defendant has wholly failed to do in the case at bar. From the facts reported there can be no doubt that one consideration for the deed from Green to the defendant was, that the latter should pay an annual rent of $20 to the plaintiff. He does not show

nor claim that there was any fraud, or misrepresentation by any one, or any misaprehension on his own part, as to the plaintiff's right to have and demand the rent in question, by which he was led to attorn to her and acknowledge himself her tenant. Nor does he claim that any other person has a title superior to hers. He simply says, "I do not know whether she is my landlord or not."

II. By attorning to the plaintiff, the defendant in legal effect said to her, "I acknowledge that these premises belong to you, and that I am occupying them as your tenant at a rental of $20 a year, to be paid at a specified time." This was equivalent in law to his saying, "I request you to let me occupy your premises and in consideration thereof, I promise to pay you a rent of $20 a year on a specified day." In other words from the facts found, the law implies a promise by the defendant to the plaintiff to pay her the rent involved in this suit. For the recovery of it, this action will lie.

Under this view of the case, the defendant has failed to point out in his brief any substantial error in the admission of testimony, and we fail to find any.

Judgment affirmed.

STATE *v.* JERRY BRADLEY.

Murder in second degree. Malice. Evidence. Threats. Exceptions.

1. Upon a trial for murder a witness, not an expert, may be properly asked what the appearance of the respondent was when charged with the crime and denying the charge.
2. And if in answer to the accusation the respondent says that the deceased died of heart disease, when in fact she died of a stab in the heart, that may be shown.
3. Evidence that the respondent threatened to kill the deceased upon condition, is admissible when accompanied by proof that the condition has happened, although such threats were made six or eight months before the killing.
4. When an exception is to the charge of the court as given, and the error insisted upon is, not that the charge as actually given was erroneous, but that the court should have gone further, the exception will not be sustained, if it would have been the duty of the court in other parts of the charge to supply the claimed omission, and it does not affirmatively appear that the court failed to do so.
5. Murder in the second degree involves malice, but not premeditation: and an instruction that it wants the elements of both malice and premeditation is erroneous.

Indictment for murder. Trial by jury at the June term, 1890, Royce, Ch. J., presiding. Verdict of murder in the second degree. Exceptions by the respondent.

The respondent was indicted for the murder of one Maggie Mattison, who, although the wife of another man, had been living with the respondent for some two years before her death. The murder was committed at the house of one Dillworth. The evidence of the State tended to show that the death of the deceased was occasioned by a wound in the heart, inflicted by some

sharp-pointed instrument, and that it might have been made by a knife which was found in the possession of the respondent when arrested. The respondent testified that he obtained this knife from one White the day after the murder.

The only person present in the Dillworth house at the time of the murder were the deceased, the respondent White, Badger and Lyons. The deceased was in bed in one of the rooms. The respondent testified that Badger, Lyons and himself were in the adjoining room drinking; that he heard the deceased groaning and went into the room where she was; that when he entered the room White was there, but at once slipped into a closet; that he went to the deceased and found her dying, whereupon he called to Badger and Lyons.

Badger and Lyons testified that at the time of the killing they heard the respondent in the room with the deceased; heard him talking with her and threaten to murder her; heard her cry out, moan and gasp, and the respondent cry out to them that she was dying; that the respondent claimed to them that she died of heart disease.

In reference to the conduct of these parties soon after the murder one Cole was improved as a witness by the State and testified as follows:

"Q. You may state if you heard any conversation between him (Bradley) and any of the others who were there with reference to what was the matter with her (Mag Shea).

Ans. This Bolger would speak out once in a while and say that Bradley killed the woman, and then he would turn it off with, she died with the heart disease.

Q. When you say he turned it off, who do you mean?

Ans. Mr. Bradley.

Q. What was his appearance then?

Ans. It kinder seemed as though he didn't want it laid to him.

Objection by the respondent.

Court admits the evidence.

Exceptions saved by the respondent.

Q. If you can state any more fully about Mr. Bradley's

appearance when Bolger made this statement that Mr. Bradley killed the woman, you may do so.

Objection by the respondent.

Q. Did Bolger make these statements in Bradley's hearing?

Ans. Yes, sir; we were all right there in the front yard.

Q. Now when he said that what was the appearance of Mr. Bradley?

Objection by the respondent. The Court admits the evidence. Exceptions saved by the respondent.

Ans. He seemed to be kinder of worried that it should be laid to him and he would turn it off in this way, that she died of heart disease; he said that she had had it and he had rubbed her an hour at a time to fetch her out of it and so on."

The State was allowed to show, against the exception of the respondent, that the respondent some six or eight months before the murder had threatened to kill the deceased if she left him, and that just previous to the killing she left him and refused to return.

The respondent also testified that the deceased had frequently threatened to take her own life and had attempted to do so by poison and with dangerous weapons, and he insisted that she might have inflicted upon herself the stab from which she died.

Upon this point the Court charged as follows:

"It is claimed by counsel in argument that that wound might have been self-inflicted. I have nothing further to say to you about that, gentlemen, unless to remind you that it is your duty to consider that proposition and if in your judgment there is any evidence to warrant the belief that she took her own life, then no one could be successfully accused of murder.

In passing upon that question the first thing you would look for would be to ascertain whether she had anything, any weapon with which she could have perpetrated the act. Did she have any such instrument, or was any such instrument found in the room or about her, as the physicians have described this stab was probably made with. I say this is a subject to which your attention would naturally be attracted, when it is claimed that she killed herself."

State *v.* Jerry Bradley.

The respondent excepted to the charge upon the subject of suicide.

The Court in defining murder in the second degree used the following language, to which the respondent excepted:

"Under this indictment you may find him guilty of murder in the first degree, the definition of that is that the killing must have been wilful, malicious and premeditated, or you may find him guilty of murder in the second degree, and the principle distinction that I find between murder in the first degree and murder in the second degree is that in murder in the second degree the elements of premeditation and malice are wanting. In order to convict of murder in the first degree the man must have premeditated the act, it must have been intended, it must have been wilful. This premeditation may not have existed more than a minute, but still it must have been formed. There is no particular length of time within which he should have cherished the intention to kill his victim.

In murder in the second degree this premeditation and malice are lacking. It may be murder in the second degree where these are both wanting. I think you must understand this definition.

I might illustrate it by citing some instances where the distinction had been made, but I think if I have made myself plain that you must understand the difference between murder in the first and second degree."

Sheldon & Cushman, for the respondent.

The Court erred in permitting Cole to give his opinion of the respondent's appearance when charged with the crime. *Greenfield* v. *People*, 85 N. Y. 75; *People* v. *Fish*, 13 Crim. Law Mag. 400; *State* v. *Nash*, 7 Iowa 347; *Brownell* v. *People*, 38 Mich. 732; *Purgear* v. *State* (Tex.) 11 S. W. 929.

The Court's definition of murder in the second degree was wrong. *State* v. *Meyer*, 58 Vt. 466-67.

O. M. Barber, State's attorney, for the State.

Evidence of the appearance of the respondent when charged with the crime was properly admitted. *State* v. *Ward*, 61 Vt. 181; *State* v. *Miller*, 19 Pac. Rep. 50; 2 Stark. Ev. 36.

Also evidence of the respondent's threats to kill the murdered woman. *State* v. *Brown*, 18 Pa. 678.

The opinion of the court was delivered by

ROSS, Ch. J. I. On trial, the witness Cole, after having testified that soon after the homicide, Bolger, who was present at the time of the homicide, would speak out and say that Bradley, the respondent, killed the woman,—was asked, against the exception of the respondent, "what was his appearance then?" He answered first "It kinder seemed as though he didn't want it laid to him," and again, "He seemed kinder worried that it should be laid to him, and would turn it off in this way, that she died of heart disease; he said that she had it and he had rubbed her an hour at a time and fetched her out of it and so on." Witness was not an expert. It is contended that the question called upon the witness to give his opinion in regard to the appearance of the respondent. Whether the question called upon the witness to give his opinion, or to describe the appearance of Bolger it was admissible under our decisions. *State* v. *Ward*, 61 Vt. 153; *Bates* v. *Sharon*, 45 Vt. 474; *Crane* v. *Northfield*, 33 Vt. 124; *Stowe* v. *Bishop*, 58 Vt. 500; *Knight* v. *Smythe*, 57 Vt. 529.

Nor do we think the answers objectionable if a departure from the question. It was that the respondent appeared kinder worried, and the witness gave his reason, that the respondent sought to avoid the charge by falsely claiming that the deceased came to her death from a disease of her heart rather than by a stab in the breast. The answer was more a statement of an admissible fact than of the opinion of the witness. It is always permissible to show that the accused when charged with the commission of a crime denied the charge, by asserting a falsehood.

II. The conditional threats of the respondent to take the life of the deceased, proof tending to show that the condition

had transpired having been introduced,—was properly admitted. The fact that the threats were made six or eight months before the homicide went, not to the admissibility, but to the weight which the jury should give to such threats.

III. The respondent excepted to the charge as to what the jury must find relative to suicide and to the charge upon that subject. It is not now contended that the charge was erroneous so far as it was given, but it is contended there was error in the failure to charge that if the evidence of suicide was sufficient to raise a reasonable doubt whether the crime of manslaughter or murder had been committed, the respondent was entitled to the benefit of that doubt. The exception taken, does not call the attention of the Court to any failure to charge, nor point out any such failure. It only drew the attention of the Court to the charge given on this subject. Hence the exception does not raise the error now insisted upon. If the attention of the Court had been called to the error now contended for, the Court, doubtless, would have corrected the claimed omission, unless in other portions of the charge the Court had given the respondent the benefit of such doubt, however raised. The case naturally required the Court to charge that to convict of any crime the evidence must establish that crime beyond a reasonable doubt. Such a charge would give the respondent the full benefit of the claimed omission. With only a brief extract of the charge given and with the case calling upon the Court to charge fully upon the subject of the claimed omission, it will be presumed that the Court gave the required charge which would supply the claimed omission. This exception is not sustained.

IV. The respondent excepted to the charge defining murder in the second degree, and especially that the element of premeditation and malice must both be wanting to distinguish the crime from murder in the first degree. The scope of this exception is that the Court's definition of murder in the second degree was erroneous. After telling the jury, that to constitute murder

in the first degree, the killing must have been wilful, malicious and premeditated, the Court told the jury that in murder in the second degree the elements of premeditation and malice are wanting. This statement of what constitutes murder in the second degree was, in substance, repeated two or three times. It is not contended but that this definition was erroneous, in that it told the jury that the element of malice was wanting in murder in the second degree. Its error is fully demonstrated in *State* v. *Meyer*, 58 Vt. 457. Murder in the second degree is there defined to be "the unlawful killing of a human being with malice aforethought, but without deliberation, premeditation or preconcerted design to kill." From the charge as given it is difficult to comprehend, on evidence sufficient to establish only manslaughter, why the jury must not have convicted of murder in the second degree, the crime found by the verdict of the jury. But it is contended, for the State, that this error, in defining murder in the second degree, must have been cured, because it is stated, that the Court instructed the jury that under the indictment the respondent might be convicted of manslaughter and correctly defined the crime of manslaughter. The language in which the Court defined manslaughter is not given. If it was the same used in defining murder in the second degree, it left the jury free to convict of either crime, as they might judge best. If the language used in defining manslaughter was different from that used in defining murder in the second degree, although the language used in defining each was of the same legal significance, the jury thereby might have been misled to the injury of the respondent. The charge defining murder in the second degree being erroneous in not requiring full proof of all which is necessary to establish the crime of which the respondent was found guilty, the charge must be held both erroneous, and injurious to the respondent unless the exceptions clearly show that he could receive no injury from the error. This, the exceptions do not show.

Luman P. Norton *v.* James H. Livingston.

Exceptions sustained, sentence, judgment and verdict set aside, a new trial granted, and cause remanded.

LUMAN P. NORTON *v.* JAMES H. LIVINGSTON.

Libel. Plaintiff confined to meaning laid by innuendo. Whether language is ambiguous, for the Court. Evidence.

1. Where the language of the alleged libel is susceptible of two meanings, in either of which it is actionable *per se*, the plaintiff is confined upon trial to that meaning put upon the words by his innuendo, and the defendant can only justify them in that sense.
2. If the language admits of more than one meaning, it is for the jury to say what it means; but it is for the court to determine whether it does admit of more than one meaning, and if not, to say what that meaning is.
3. The meaning of the libel should be gathered from the whole publication, read and understood as people in general would read and understand it.
4. The entire publication was: "Luman P. Norton is the only insurance agent in Vermont who has been convicted in open court of wilful perjury." *Held*, that the word "convicted" could only mean, found guilty by legal decision, and was not susceptible of the meaning, proved guilty or detected in guilt.
5. Upon the cross-examination of the defendant certain subsequent articles in his newspaper were introduced upon the question of malice. It appeared that these articles were written and their publication paid for by one Childs. Thereupon the plaintiff offered to show that there existed a bitter feud between Childs and the plaintiff, and that the plaintiff had published many libellous articles concerning Childs, which provoked these articles. *Held*, not admissible, it not appearing that this feud between Childs and the plaintiff was known to the defendant, nor that Childs instigated the libel in suit.

Action for libel. Plea, the general issue with notice of special matter in justification. Trial by jury at the February

term, 1892, Bennington county, Tyler, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The libel sued upon was as follows; "Luman P. Norton is the only insurance agent in Vermont who has been convicted in open court of wilful perjury," and this was the whole publication. The plaintiff alleged by the innuendos in his declaration that the defendant meant thereby to charge the plaintiff with having been indicted, tried and convicted of perjury. The defendant set forth in his notice and offered to show on trial that in a certain action pending in the Bennington County Court, to which the plaintiff was a party, the said plaintiff testified in his own behalf, and in the course of his testimony upon a material issue committed perjury; that he was then and there detected therein in so summary and convincing a manner that his guilt was apparent to all who were present; and the defendant insisted that the word "convicted" was not used in its legal sense of tried and found guilty, but in its more popular sense of found guilty or detected in guilt, in which, if the jury found the words were so used, they were true. The court ruled, however, that the defendant could justify the language only in the sense laid by the innuendo, and rejected the evidence as matter of justification, to which the defendant excepted.

The defendant then claimed that it should be left to the jury to say whether the words were used in the sense claimed by him or in the sense put upon them by the innuendo, but the court declined to submit this issue to the jury, and instructed them to return a verdict for the plaintiff, to which the defendant excepted.

The remaining exception appears in the opinion.

C. A. Prouty and *C. H. Mason*, for the defendant.

The innuendo might have been rejected on trial by the plaintiff and a recovery had upon the words themselves. Hence it should have been left to the jury to say in what sense they were used, and if the jury found that they were used in the sense

claimed by the defendant, then he might show that in that sense they were true. Odgers Lib. and Slan. 101, 177, 487; *Sabin* v. *Angell*, 46 Vt. 740; *Watkin* v. *Hall*, L. R. 3 Q. B. 396.

If this is not so, and the plaintiff was bound by meaning assigned by the innuendo, then it should have been left to the jury to say whether the words were used in that sense. Odgers Lib. and Slan. 94, 98, 101; Folk. Star. Slan. and Lib. ss. 556, 559, 561, 564; *Riddell* v. *Thayer*, 127 Mass. 487; *Goodrich* v. *Wolcott*, 3 Cow. 231.

Waterman, Martin & Hitt, and *C. H. Darling*, for the plaintiff.

If the defendant seeks to justify, he must justify the libel as laid in the innuendo. *Nott* v. *Stoddard*, 38 Vt. 25; *Royce* v. *Maloney*, 57 Vt. 325.

The language of the libel was plain and unambiguous. It could only have been understood by the reader in one sense, and it is immaterial what the writer may have intended. Town. Sl. and s. 140; *Knapp* v. *Fuller*, 55 Vt. 311.

The opinion of the court was delivered by

ROWELL, J. The defendant did not attempt to justify the publication in the sense ascribed to it in the innuendo, but claimed that it is capable of being understood in another and a different sense, and sought to have that sense found by the jury and to justify accordingly, admitting a libel in either sense.

The basis of his position in respect of justification is, that the plaintiff was not bound by the innuendo, but was at liberty to abandon it and to rely for recovery on the meaning claimed by the defendant, and that therefore the defendant had a right to do as he sought to do.

But this position is not tenable; for when the words have different meanings, either of which makes them actionable, an innuendo, if it is good, determines which meaning the plaintiff intends to rely upon, and therefore he cannot abandon the in-

nuendo at the trial and rely upon a different meaning. 1 Am. Lead. Cas. 141. The language of *Bagley*, B., in *Williams* v. *Scott*, 1 C. & M. 675, 687, is so much in point that we quote it: "It has been contended that this innuendo may be rejected, and that the plaintiff will then be entitled to a verdict on this count. * * * You may reject on demurrer or on motion in arrest of judgment an innuendo that is not warranted by the preceding allegations in the declaration; and all the cases cited by the plaintiff's counsel are cases of this description. But the question here is, whether you may reject at the trial an innuendo that is good upon the face of the declaration? By such an innuendo the plaintiff makes it part of his case that the alleged slander bears the peculiar character that he assigns to it; and I know of no instance in which it has been held that you may separate the words themselves from the explanation that the plaintiff has given to them. *Sellers* v. *Till*, 4 B. & C. 655; *Smith* v. *Carey*, 3 Camp. 461, and the dictum of Lord *Ellenborough* in *Woolnoth* v. *Meadows*, 5 East, 470, lean the other way, and appear to show that the whole of an innuendo that is not bad on the face of the declaration must be proved; they show that such an innuendo gives a specific character to the libel or slander that becomes parcel of the issue, and a failure in proof of which will be fatal to the plaintiff's case." *Smith* v. *Carey* is an apt illustration of this rule. There the words were that "he lived by swindling and robbing the public." They were laid differently in different counts, but in each count there was an innuendo that the defendant thereby meant that "the plaintiff had been and was guilty of *felony* and *robbery*." The words were proved as laid, but they appeared to allude to a transaction from which it might be inferred that the defendant meant to charge plaintiff only with *fraud*. Lord *Ellenborough* said that the words in themselves were actionable, and that if there had been no such innuendo as to their meaning, the plaintiff would certainly have been entitled to a verdict; but that the plaintiff

was bound to show that they were spoken in the sense he had ascribed to them, and if the jury should be satisfied that they were spoken with intent to impute, not felony, but merely fraud, there must be a verdict for the defendant.

The defendant, in support of his position, refers to Odgers on Lib. & Sland. 101, 177, 487, and *Watkin* v. *Hall*, L. R. 3 Q. B. 396. But these are authorities under the Common Law Procedure Act, 1852, which altered the common law, and by which every innuendo may be good although not supported by a prefatory averment, and a declaration containing one count for libel or slander, with an innuendo that the words were used in a particular sense, is taken as if there were two counts, one with the innuendo and one without the innuendo; and if the plaintiff proves either, it is sufficient. It follows, therefore, that the defendant may plead a justification as to the words with the meaning in the innuendo and also as to them without that meaning. But that such was not the common law, Mr. Justice *Blackburn* shows in that very case, for he says that before the passage of that act, an innuendo was preceded by an inducement as to the application of the slander, and if the inducement did not support the innuendo the action failed, because it was not allowable to show that the words were used in a different though slanderous sense, unless the declaration charged words that were actionable without any explanation. This amounts to saying that the innuendo being bad, may be rejected. Mr. Justice *Willes* puts it more pointedly in *Bremridge* v. *Latimer*, 12 W. R. 878, thus: "Formerly [before the passage of said act] where the declaration made use of an insufficient innuendo, that innuendo might alway be rejected as surplusage, to prevent the plaintiff from being defeated; but where the innuendo could be supported, the plaintiff was bound by it."

The innuendo in the case at bar is good, because the libel is certainly susceptible of the meaning ascribed to it, and therefore the plaintiff was bound by the innuendo, and could not recover

unless the words meant what they were alleged to mean. But if they are also susceptible of the meaning claimed by the defendant, it was for the jury to say what they mean, and not to submit that question was error; hence the question arises whether they are susceptible of the meaning claimed. The language is this: "Luman P. Norton is the only insurance agent in Vermont who has been convicted in open court of wilful perjury."

The rule in the construction of alleged libels is, that if the language is ambiguous and admits of more than one meaning, it is, when necessary to ascertain the meaning, for the jury to say what it means; but if, on the other hand, the language is not ambiguous and does not admit of more than one meaning, it is for the court to say what it means. *Gregory* v. *Atkins*, 42 Vt. 237; *Lewis* v. *Chapman*, 16 N. Y. 369; *Hunt* v. *Bennett*, 19 N. Y. 173; *Pittock* v. *O'Niell*, 63 Pa. St. 253; 3 Am. Rep. 544; *Bourreseau* v. *Detroit Evening Journal Co.* 63 Mich. 425; 6 Am. St. Rep. 320.

The meaning of this libel depends upon the construction to be given to the word "convicted" as used therein. The defendant claims that it is capable of being understood to mean, not only that the plaintiff had been convicted in the sense of having been tried and found guilty by legal decision, but also that he had convicted himself by his own testimony in open court, and stood self-convicted in the minds and estimation of those who heard him testify; or, in other words, that his testimony in open court had detected him in wilful perjury, or proved him guilty of it. The meaning of that word is to be gathered from the whole publication, which we must read as people in general would read it, and understand it as they would understand it; and reading and understanding it thus, what is there to suggest the meaning claimed by the defendant? The words are direct and positive—"has been convicted in open court of wilful perjury." Language could scarcely be more apposite, not only to impute perjury, but to charge a conviction of it by legal decision.

It is the conviction that is charged to have been in open court, not the perjury, which, as the defendant claims, constituted the conviction that the libel means. The perjury may have been committed out of court as well as in court, for ought that is said. We think that the language is justly susceptible of no other meaning than the one ascribed to it in the innuendo, and that to have submitted it to the jury to find another meaning would have been allowing them to indulge in unwarrantable conjecture.

In his testimony the defendant disavowed malice. On cross-examination touching that disavowal, his attention was called to several articles in subsequent issues of his paper, the publication of which he admitted, and they were put in evidence. It appeared that some of those articles were written by one Childs, and their publication paid for by him at ten cents a line, but that they appeared in the paper as editorials and news items. The defendant thereupon offered to show that there had been a long standing feud between Childs and the plaintiff; that the plaintiff had published or caused to be published scurrilous and libellous articles concerning Childs; and that the libellous articles paid for by Childs grew out of that feud. The defendant admitted that he composed and wrote the libel sued for, and did not claim that Childs instigated it. The testimony was excluded, for which a sufficient reason is found in the fact that it does not appear and was not offered to be shown that at the time of the publication of those articles the defendant had any knowledge of the existence of such feud, without which the fact that it existed and that those articles grew out of it, could not avail him if otherwise it might, as to which we express no opinion.

Judgment affirmed.

WINDSOR COUNTY.

FEBRUARY TERM, 1892.

PRESENT: ROWELL, TYLER, START AND THOMPSON, JJ.

WILLIAM AND PAUL TINKHAM *v.* TOWN OF STOCKBRIDGE.

How far the approaches are a part of bridge. Evidence. Notice.

1 Whatever is necessary to connect the structure which spans a stream and the abutments on which it rests with the highway built on solid ground, and make that structure accessible and useful as a part of the highway, is a part of the bridge.

2. The injury complained of was occasioned by the falling of the plaintiff's horse over an embankment wall, which he claimed was a part of the approaches to the bridge. This the defendant denied and insisted that it was a retaining wall rendered necessary by the construction of another highway to connect with the one which originally crossed the stream at this point. *Held*, that the defendant should have been permitted to ask of witnesses long acquainted with the locality what part of the support of the bridge or of the filling of the abutment was made by the bank wall at the place of the accident.

3. Nor would the error occasioned by the exclusion of this evidence be cured by the fact that a photograph of the locality was exhibited to the jury.

4. The declaration alleged that the bridge was defective in that there was a high wall extending about fifty feet from end of the bridge, and that there was no sufficient guard on said abutment or approach. The notice set forth that the horses ran onto the abutment of the bridge, and for want of a guard thereon one of them went off the first abut-

ment about five feet from the end of the bridge. *Held*, that the notice supported the declaration, it appearing from other evidence in the case that the wooden structure of the bridge extended some distance beyond the abutment proper.

5. *Held*, further, that the notice was sufficient, for that the selectmen, with it in hand, could have found without difficulty the place.

Case for negligence of defendant in maintaining a defective bridge. Plea, the general issue. Trial by jury at the May term, 1891, Ross, Ch. J., presiding. Verdict and judgment for the plaintiff. The defendant excepts. The questions raised sufficiently appear in the opinion.

The notice was as follows:

To O. G. Richardson, Wm. H. Edmunds and Charles Cobb, selectmen of the town of Stockbridge:

You are hereby notified that on the 21st day of March, A. D. 1890, at said Stockbridge, one Wells Blanchard, of said Stockbridge, was driving a span of horses belonging to us down the hill in said Stockbridge between the so-called Stony Brook bridge and the dwelling house of Emmans Knowlton in said Stockbridge, that said horses then and there on said hill became frightened and unmanageable and ran away and got away from said Blanchard and ran towards said Stony Brook bridge and onto the abutment thereof, and for want of proper and sufficient muniment or guard on said abutment, one of the horses went off said abutment and fell a distance of from ten to fifteen feet, thereby killing said horse. Said horse fell from the first abutment of said bridge on the right hand side as one would go from Rochester to Bethel, about five feet from the end of the bridge, nearest the junction of the Stony Brook road with the so-called river stage road.

And you are hereby notified that we shall claim satisfaction of the town of Stockbridge for the injury and damage occasioned to us as aforesaid.

WM. TINKHAM & SON."

Hunton & Stickney and *W. E. Johnson*, for the defendant.

The question as to what part of the approaches the retaining wall formed was one of fact, not opinion, and proper. *Lund and wife* v. *Tyngsborough*, 9 Cush. 36, 39; *Porter* v. *Pequonnoc Mfg. Co.*, 17 Conn. 249, 256.

Even if an opinion, it was of such a nature as to be admissible. *Hardy* v. *Merrill*, 56 N. H. 227, 241; 1 Whart. Ev. ss. 509-513; *Parsons* v. *Insurance Co.*, 16 Gray, 463, 467; *State* v. *Folwell*, 14 Kan. 110; *Indianapolis* v. *Huffer*, 30 Ind. 235, 237; *Bates* v. *Sharon*, 45 Vt. 475, 480; *Fulsom* v. *Concord*, 46 Vt. 140.

There was no evidence tending to show that the wall at the place of the accident was a part of the bridge. *Powers* v. *Woodstock*, 38 Vt. 44, 49.

J. J. Wilson, for the plaintiff.

The charge as to what of the approach constituted a part of the bridge was correct. *Bardwell* v. *Jamaica*, 15 Vt. 438; *Tol. land* v. *Wellington*, 26 Conn. 578; *Freeholders of Sussex* v. *Strader*, 3 Harrison, N. J. 102; *Penn. Township* v. *Perry County*, 78 Pa. St. 457; *Daniels* v. *Athens*, 55 Ga. 609; *State* v. *Gorham*, 37 Me. 461; *Commonwealth* v. *Central Bridge Corp.*, 12 Cush. 242.

The notice was sufficient. *Law* v. *Fairfield*, 46 Vt. 425; *Ranney* v. *Sheffield*, 49 Vt. 191; *Bliss* v. *Whitingham*, 54 Vt. 172; *Melendy* v. *Bradford*, 56 Vt. 148; *Reynolds* v. *Burlington*, 52 Vt. 300.

The evidence rejected was an opinion upon the very question for the jury. *Lester* v. *Pittsford*, 7 Vt. 158; 1 Star. Ev. 153; *Clifford* v. *Richardson*, 18 Vt. 620; *Cram* v. *Northfield*, 33 Vt. 124; *Frazer* v. *Tupper*, 29 Vt. 410; *Cavendish* v. *Troy*, 41 Vt. 99; *Fulsom* v. *Concord*, 46 Vt. 135; *Oaks* v. *Weston*, 45 Vt. 430; *Carpenter* v. *Corinth*, 58 Vt. 214; *Stowe* v. *Bishop*, 58 Vt. 498; *Bennett* v. *Rd. Co.*, 58 Vt. 636.

The opinion of the court was delivered by

ROWELL, J. The court charged in effect that, whatever was necessary to connect the wooden structure that spanned the stream and the stone abutments on which it rested with the highway built on the solid ground, and to make the structure acces-

sible and useful as a part of the highway, was a part of the bridge. This was substantially correct. As we have no statute that determines the question, we must resort to the common law to find out what, aside from the structure itself, constitutes a part of a bridge.

By the common law of England, declared by 22 Hen. VIII. c. 5, and subsequent bridge acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to the repair of the highway at the ends of the bridge to the extent of three hundred feet. *The King* v. *The West Riding of York*, 7 East, 588. In that case Lord *Ellenborough* said he considered it as having been laid down long ago by Lord *Coke* that the three hundred feet of highway at the ends of the bridge are to be taken as a part of the bridge itself, being in the nature of the thing immediately connected with it, and the exact limits difficult in some cases to be ascertained from the continuation of arches beyond the sides of the river; that the highway within the limits of the three hundred feet at each end is dependent on the bridge as to its form and dimensions, as its level must be varied as the bridge is made higher or lower, so as to make the ascent or descent more gradual.

But in this country there is no arbitrary distance at the ends of bridges that can be said as matter of law to constitute a part of them, but it is more a question of fact for the jury in the circumstances of the particular case, to be determined under proper instructions. That the abutments proper are to be taken as a part of the bridge there seems to be no question. *Bardwell* v. *Jamaica*, 15 Vt. 438.

In the *Board of Freeholders* v. *Strader*, 3 Harrison (N. J.), 108, the horse fell from the part of the way that connected the abutment proper of the bridge with the land, ordinarily called *the filling up*. This the freeholders, who were county officers, claimed was no part of the bridge but a part of the road or causeway, and therefore should have been repaired by the overseers.

of highways, who were township officers. But *the filling up* was held to be a part of the bridge because it was necessary to make the bridge itself accessible.

In *Penn Township* v. *Perry County*, 78 Pa. St. 457, two counties were bound by statute to build a bridge. It was fully completed, except that the space between the wing-walls on the Perry County side of the river was not filled in with earth nor other material so as to make approach to the main structure possible; and the question was, whether the township or the county was liable for the expense of this filling-in, and this depended upon whether the wing-walls and the filling-in were to be taken as a part of the bridge or a part of the road leading thereto, and they were held to be a part of the bridge. The Court said that the bridge was incomplete until everything necessary for its proper use was supplied, and that every such necessary appliance was a part of the bridge.

In *Daniels* v. *The Inhabitants and Wardens of Athens*, 55 Ga. 609, plaintiff's horse backed from a bridge off a contiguous embankment. The Court charged that if the embankment was contiguous to the bridge, and necessary to enable teams and wagons to cross the stream over the bridge, it was in law a part of the bridge; and this was held correct. See also, *Tolland* v. *Willington*, 26 Conn. 578.

Powers v. *Woodstock*, 38 Vt. 44, is not in point, as the case turned on the construction given to the commissioners' report. But in *Ford* v. *Braintree*, *ante*, 144, this Court said that to bring a case within the statute, the accident must have happened and the injury have been sustained while the traveler was passing over the bridge, culvert, or sluice, or over that portion of the road that constitutes the approaches to it, so that the insufficiency or want of repair of the structure itself or of its approaches was the direct cause of the injury.

The defendant claimed that the place of accident constituted no part of the bridge but was a part of the Stony-Brook road,

which was built along there on a steep side-hill, the filling being kept in place by the retaining-wall over which the horse fell and which connected with the abutment proper of the bridge. That abutment was rebuilt in 1869, and set back from ten to twelve feet, to widen the channel, and the lower end of it extended into the natural bank. The defendant claimed that to make the bridge accessible, no alteration of the conditions existing before the bridge was built had been required, except to replace the soil removed in building the abutment on which the bridge rested, and that such replacement had not extended so far back as the point where the horse went off, but that any alteration of nature there, was due to the building of the Stony-Brook road when it was made to intersect with the river road at that end of the bridge.

The defendant called witnesses who had been long acquainted with the bridge and its approaches and with the Stony-Brook road at the point in question, and knew how they were built. After they had testified with more or less fullness to their knowledge in this respect, this question was put to them: "From your knowledge of the location, will you state to the jury what, if any, part of the support of the bridge or of the filling of the abutment is made by the bank-wall at this point?" meaning the point where the horse went off. The question was excluded, not because it called for irrelevent testimony, but because it was thought to invade the province of the jury, in that it called for the opinion of the witnesses and not for a fact within their knowledge. If it is to be regarded as calling for matter of fact, it certainly was permissible, for, as said by the Court in ruling upon it, whether the road at that point was a part of the bridge or not was one of the principal questions of fact in the case, to be determined from all the circumstances. The question then arises, Did the question call for matter of opinion? If not, it was proper, however it might have been if it had called for such matter. Now when we consider that it was put to witnesses

whose testimony had already shown they were likely to know just how that was as matter of fact, we think the question was not fairly susceptible of any other meaning than that of calling for the knowledge of the witnesses upon the subject and not for their opinion. Hence, it was error to exclude it. But the plaintiffs say, if error, it was harmless, because they say the photographs used in the case presented the situation fully and accurately to the jury, and that witnesses could have known nothing more about the matter than the photographs showed. But this can hardly be so, and if it was, it probably would not cure the error.

The notice of the place of injury was seasonably objected to as variant from the first count aud not supporting the second count. If it supported the second count we need not inquire whether it is variant from the first count. The second count, after alleging the existence of the highway and the bridge, alleges that the bridge, with its abutments and approaches, was insufficient and out of repair in this, that there was a high wall extending from the end of the bridge nearest the Stony-Brook road about fifty feet; that there was no sufficient guard or muniment on said abutment or approach to the bridge; and that, by reason thereof, the horses running away, one of them fell over said abutment or approach about ten feet from the end of the bridge and was killed. It is evident as matter of construction that by *abutment* and *approach*, as those words are used in the count, the wall therein described is meant. The notice says that the horses ran onto the abutment of the bridge, and for want of a sufficient guard or muniment thereon, one of them went off the first abutment about five feet from the end of the bridge and was killed.

The notice saying that the horse went off the *first* abutment, the defendant claims that it should be construed to mean that it went off the abutment proper on which the bridge rested, and not off the retaining-wall, as the second count in effect alleges. But the

trouble with this claim is, that the end of the wooden structure of the bridge extends beyond the abutment proper, and when you get five feet from the end of the bridge, as the notice puts the distance, you are quite beyond the abutment proper and well onto the retaining-wall. This clearly appears from a photograph in the case, and shows that the retaining-wall was meant and not the abutment proper. The notice, therefore, supported the second count, and was properly admitted.

The notice has been criticised as fatally uncertain in other respects. But we think it certain enough to answer the purpose for which the statute required it to be given. With it in hand, the selectmen could have had no trouble in finding the place.

The exceptions to the overruling of the defendant's motions for a verdict and to set aside the verdict, are argued on some of the grounds we have considered and on the further ground that there was no testimony in the case tending to show that the place where the horse went off was a part of the bridge. But without undertaking to group the testimony and to collate the circumstances, we think there was enough in the case to require the overruling of the motions.

Judgment reversed and cause remanded.

McCASKER & MALLOW *v.* JOSEPH ENRIGHT.

Evidence of similar fraudulent acts.

The claim of the defendant being that the note in suit had been obtained by fraudulent representations upon the part of the payee to the effect that it was not a note but a contract, *held*, that evidence of similar fraudulent transactions was admissible upon the question of intent.

Special assumpsit on note. Plea, the general issue. Trial by jury at the May term, 1891, Ross, Ch. J., presiding. At the close of the testimony the Court ordered a verdict for the plaintiff. Exceptions by the defendant. The opinion states the case.

J. C. Enright, for the defendant.

Evidence of contemporaneous similar fraudulent transactions was admissible. *Eastman* v. *Premo*, 49 Vt. 335; *Henquin* v. *Taylor*, 24 N. Y. 139; *Bradley* v. *Ober*, 10 N. H. 291, 477; *Pierce* v. *Hoffman*, 24 Vt. 525; *Bradley Fertilizer Co.* v. *Fuller*, 58 Vt. 315.

Geo. L. Fletcher, for the plaintiff.

The Court properly excluded the depositions. *Noyes* v. *Landon*, 59 Vt. 569; *Blaney* v. *Pelton*, 60 Vt. 285; *Powers* v. *Ball*, 57 Vt. 662; *Farrer* v. *Freeman*, 44 Vt. 63; *Thrall* v. *Horton*, 44 Vt. 386; Story Prom. Notes, s. 191, 215; Chit. Pl. 78, 79; *Hascall* v. *Whitmore*, 19 Me. 102; *Smith* v. *Hiscock*, 14 Me. 499; *Homes* v. *Smith*, 16 Me. 177; 1 Am. Lead. Cas. 332 and cases cited; *Blanchard* v. *Stevens*, 3 Cush. 162; *Chicopee Bank* v. *Chapin*, 8 Met. 40; *Atkinson* v. *Brooks*, 26 Vt. 569.

The opinion of the court was delivered by

ROWELL, J. The defendant's testimony tended to show

that nothing was said about his giving a note for the cloth, that he did not intend to give a note for it, and did not suppose he did, but supposed he was giving an obligation embodying the contract, which was, to pay for the cloth in three months if he had then sold it, but if not, then to pay for what he had sold, return the rest, and receive back his obligation; that O'Brine, the payee of the note, wrote the paper he signed, but did not read it to him, nor did he read it himself, but took O'Brine's statement as to what it was; that when his wife indorsed the paper at O'Brine's request, to show that the sale was made to the head of a family, she attempted to see its face, but was prevented by O'Brine. His testimony further tended to show that he sold none of the cloth and saw no more of O'Brine, and that the next he heard about it was on August 4, 1890, when he received a letter from the plaintiff, calling him to go to the bank in Chester and pay the note, which was the first time he understood he had given a note.

The defendant claimed as matter of defence that he was defrauded in giving a note instead of an obligation embodying the contract; and on that question O'Brine's intent in the premises was material and relevant.

The defendant does not claim in argument that the testimony in the case impeached the note so as to cast the burden on the plaintiffs to show that they were *bona fide* holders of it, but complains of the exclusion of depositions offered by him to show prior similar fraudulent transactions on the part of O'Brine, had with other parties, whereof the plaintiffs had knowledge before they bought the note in suit. One of those depositions tends to show that O'Brine got the deponent's note for cloth when the deponent supposed he was giving an obligation entirely different in terms and legal effect; that he saw no more of O'Brine; and that the plaintiffs afterwards sued him on the note. Another deposition tends to show that O'Brine got the deponent's note for cloth on the strength of representing that he had twelve

tailors following him, cutting and making, who would be along the then next week and "board it all out," and perhaps more; that the twelve tailors did not come; O'Brine was seen no more, and the next deponent knew he received a letter from the plaintiffs that they held the note and were innocent purchasers thereof.

It is immaterial for present purposes whether those depositions show that the plaintiffs knew about the transactions therein related or not when they bought the note in suit, for if they were relevant to show a fraudulent intent on the part of O'Brine in obtaining the defendant's note instead of his obligation embodying the contract, they should have been admitted, as they, with the testimony in the case, would so far have impeached the note for fraud in obtaining it as to cast the burden on the plaintiffs to show that they were *bona fide* holders.

The plaintiffs claim that the testimony contained in these depositions is too remote, and invoke the rule that inferences cannot be drawn from one transaction to another that is not specifically connected with it merely because the two resemble each other; that they must be linked together by the chain of cause and effect in some assignable way before you can draw the inference. But this, like most general rules, has its exceptions, and one exception is in respect of facts showing system, which Mr. Justice *Stephen* formulates thus: When there is a question whether an act was accidental or intentional, the fact that such act forms part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant. Dig. Ev. Art. 12. This exception is variously stated but well recognized, both in this State and elsewhere. Thus, in *Castle* v. *Bullard*, 23 How. 172, 186, it is said that the decided cases have established the doctrine that cases of fraud are among the well recognized exceptions to the general rule that other wrongful acts of the defendant are not admissible on the trial of the particular charge immediately involved in the issue; that similar fraudulent

acts are admissible if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration; that some of the decisions go further, and hold that such evidence is admissible as affording a ground of presumption to prove the main charge. *Eastman* v. *Premo*, 49 Vt. 355; *Bradley Fertilizer Co.* v. *Fuller*, 58 Vt. 315, are full authority in this State for the exception.

No claim is made that the transactions disclosed by the depositions were too remote in point of time. The depositions were admissible for the purpose above indicated, and their exclusion was error.

As the point was not made in argument, we express no opinion as to the impeaching quality of the testimony in the case.

Judgment reversed and cause remanded.

WM. P. HAWLEY & N. P. HAWLEY *v.* HENRY W. SHELDON.

Watercourse defined.

Where the water, flowing in a watercourse, spreads out over the surface, ceases to have and never returns to a defined channel, the character of a watercourse is lost.

Case for the obstruction of a watercourse. Plea, the general issue. Trial by jury at the December term, 1891, Taft, J., presiding. The Court directed a verdict for the defendant upon the ground that there was no evidence tending to show the existence of a watercourse. The plaintiffs except.

The opinion states the case.

J. C. Enright and *J. J. Wilson*, for the plaintiffs.

The evidence of the plaintiffs tended to show the existence of a watercourse. *Beard* v. *Murphy*, 37 Vt. 99; *Winn* v. *Rutland*, 52 Vt. 481; *Boynton et al* v. *Gilman*, 53 Vt. 17; *Gillette* v. *Johnson*, 30 Conn. 180; *McComber* v. *Godfrey*, 108 Mass. 209, 219; *Ferris* v. *Wellburn*, 64 Miss. 29; *McClure* v. *Redwing*, 28 Minn. 187.

Gilbert A. Davis, *W. E. Johnson* and *Frank H. Clark*, for the defendant.

There was no watercourse. *Ashley* v. *Wolcott*, 11 Cush. 195; Ang. Waters, 44; Gould Waters, ss. 263, 264 and 41; and cases cited; *Bangor* v. *Lasell*, 51 Me. 521; *Avery* v. *Empire Woolen Co.*, 82 N. Y. 582; *Park* v. *Newburyport*, 10 Gray 28; *Howard* v. *Ingersoll*, 13 How. 427; *Gibbs* v. *Williams*, 25 Kan. 214; *C. K. & W. R. Co.* v. *Morrow*, 42 Kan. 339, 340, 341; 3 Kent's Com. s. 439, note a; *Rawston* v. *Taylor*, 33 Eng. L. & Eq. 428; *Broadbent* v. *Ramsbotham*, 34 Eng. L. & Eq. 553; *Luther* v. *Winnisimmet Co.*, 9 Cush. 171; *Shields* v. *Arndt*, 3 Green Ch. R. 234, 246.

The opinion of the court was delivered by

TYLER, J. The action in case for obstructing a brook or stream of water. When the plaintiffs rested, the court, on motion, directed a verdict for the defendant.

The plaintiff's evidence tended to show that certain springs in the hillside in their land ran down and formed a small pond near the highway and thence the water made its way through a ravine and spread out upon the meadow below; that in the year 1852, for the purpose of forming a channel for the water and of draining the land so they could drive upon it, they turned a furrow through the ravine, terminating within ten or twelve feet of the line fence between their land and the defendant's; that it was a deep furrow until near the lower end, when it was shallower and

ended with a turn to one side so as to discharge the water upon the surface of the ground; that the water that ran in the ditch mainly came from the pond; that water ran in the ditch all the year, generally two to three inches deep by about six inches wide less than that in dry weather and considerably more in case of heavy rains and melting snows; that in 1887, the channel having become obstructed, the plaintiffs cleared it out to about its former capacity; that the water had no channel after it left the ditch; that sometimes when low, it would disappear in the plaintiff's grass land and not visibly reach the division line, and that when it was higher it would overflow upon the defendant's land; some of the witnesses said it "soaked through" the land between the end of the ditch and the line fence; that it never resumed a channel after it passed onto the land of the defendant; that the defendant with sods and sticks made an obstruction along the line upon his own and the plaintiff's land and prevented the water from entering upon his land, which is the cause of action alleged.

The case must be governed by the law relative to watercourses, which is well settled.

We have seen no better definition of a watercourse than that given by Chancellor *Williamson*, 1 Beas. Ch. R. 280; (72 Am. Dec. 394): "A watercourse is a channel or canal for conveyance of water, particularly in draining lands; it may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land." Angell on W. C. s. 4, says that a watercourse consists of bed, banks, and water, though the water need not flow continuously—that many watercourses are sometimes dry. There must be a distinct channel, the bed of the stream, with well defined banks, cut through the turf and into the soil

by the flowing of the water, presenting on a casual glance to every eye the unmistakable evidences of the frequent action of running water, and not a mere depression. *Gibbs* v. *Williams*, 25 Kan. 214, (37 Am. R. 241).

This stream, small as the evidence tended to show it was, and small as was its channel, clearly falls within the legal definition of a watercourse. Its beginning was at the point where it first received the percolating water of the ravine and sent it down towards the meadow in one course; its terminus was at the point where the furrow ran out and the water was discharged upon the meadow near the defendant's land.

By reason of the nature or conformation of the soil, water sometimes leaves its channel, and after spreading over a wide space without apparent banks, flows a considerable distance and again takes a regular channel, yet it maintains its character as a watercourse. *Macomber* v. *Godfrey*, 108 Mass. 219; *Gillett* v. *Johnson*, 30 Conn. 180. But in this case none of the plaintiff's evidence tended to show that the water ever found a channel on the defendant's land; on the contrary, it was lost in the soil near the division line. From the end of the ditch to the fence, a distance of ten or twelve feet, there was no channel; all the witnesses so testified. Wm. Hawley, one of the plaintiffs, was asked:

Q. "Why didn't you run it clear down to the line fence?" A. "I didn't propose to throw all the water on to Mr. Sheldon. I didn't run it there. I left it within ten feet—I don't know just ten—ten or a dozen, and let it spread its natural course."

In answer to the question: "When it gets down to the end of the channel where does it go to," he said: "It spreads off on both farms." So it appears from his own testimony that it became mere surface water and was squandered when it reached the end of the ditch.

If this stream of water had continued in a defined channel upon and over the defendant's land, he and the plaintiffs would have acquired correlative rights in relation to it. Each party

would have had a right to its natural flow; but upon the evidence produced by the plaintiffs the defendant was not guilty of obstructing a brook or stream of water, and the court below properly directed a verdict in his favor.

Judgment affirmed.

NELSON GAY'S ESTATE *v.* NAOMI B. HASSOM ET AL.

Statute of limitations. Acknowledgment of payment. Payment by husband may keep alive mortgage as against wife.

1. An endorsement upon a promissory note, "Paid on this note, March 11, 1882, ten dollars," signed by the maker, is a sufficient written acknowledgment to interrupt the running of the statute of limitations, although no payment was in fact made.
2. And where a wife joined with her husband in a mortgage of her real estate to secure the payment of the note, which was signed by her husband alone, such an acknowledgment by the husband will keep alive the mortgage as against her.

Foreclosure of mortgage. Heard upon the pleadings, a special master's report, and exceptions thereto, at the December term, 1891. Taft, chancellor, decreed a foreclosure with costs. The defendants appeal.

The opinion states the case.

J. J. Wilson, for the orator.

Neither party can repudiate the transaction by which a payment of ten dollars on the mortgage note was acknowledged. *McConnell* v. *Merrill et al.*, 53 Vt. 149.

That transaction was a sufficient recognition of the debt. *Martin* v. *Bowker*, 19 Vt. 526; *Phelps* v. *Steward*, 12 Vt.256; *Moore* v. *Stevens*, 33 Vt. 308; *Blake & Heart* v. *Parlemon*, 13

Vt. 574; *Beewin* v. *Farrell*, 39 Vt. 206; *Hunter* v. *Kittridge*, 41 Vt. 359; *Brayton* v. *Rockwell*, 41 Vt. 621.

And it affected all persons interested in the equity of redemption. *Barrett* v. *Prentice*, 57 Vt. 300; *Hollister* v. *York et al.*, 59 Vt. 1; 2 Jones Mort. s. 1198.

Hunton & Stickney, for the defendants.

Equity will not aid a stale claim. *Smith* v. *Clay*, 3 Bro. Ch. 638; *Battley* v. *Faulkner*, 3 B. & Al. 293; *Green* v. *Rivett*, 2 Salk. 422; *Kelling* v. *Shaw*, 1 Moore 345; *Clemetson* v. *Williams*, 8 Cranch, 72.

In fact the ten dollars was not paid; hence it did not renew the note. *Blanchard* v. *Blanchard*, 122 Mass. 558; *Waters* v. *Tompkins*, 2 C. M. & R. 732, 726; *Ray* v. *Rood*, 62 Vt. 293; *Hale* v. *Wilson*, 30 N. W. Rep. 739; *Smith* v. *Westmoreland*, 12 S. & M. 663; *Davison* v *Harrison*, 33 Miss 42.

At all events the payment does not bind the wife. She was surety for her husband's debt, and the statute expressly exempts a surety from the effect of a part payment by the principal. *Purvis* v. *Carstaphan*, 73 N. C. 575; *Short* v. *Battle*, 52 Ala. 456; *Bank of Albion* v. *Burns*, 46 N. Y. 170; *Gleaves* v. *Paine*, 1 De G. J. &. S. 87, 95, 96; 1 Bishop Mar. Wom. s. 604; Bay. Sur. pp. 3, 4; *McMillan et al* v. *Bull's Head Bk.* 32 Ind. 2; *Kearnes* v. *Montgomery* 4 W. Va. 29, 40; R. L. 986; Acts 1884 No. 140, s. 1, last clause; *Gould* v. *Cayuga Co. Bk.* 86 N. Y. 75; *Harper* v. *Fairley*, 53 N. Y. 442; *Whitcomb* v. *Whiting*, 2 Doug. 652; *Joslyn* v. *Smith*, 13 Vt. 353, 356.

The opinion of the court was delivered by

START, J. The defendant, Naomi B. Hassom, and her husband, George P. Hassom, on the 14th day of October, 1867, gave a mortgage of her real estate to secure the payment of his note to M. N. Gay & Son for the sum of ten hundred and forty dollars. On the 11th day of March, 1882, George P. Hassom made an indorsement upon the back of the note as follows:

"Paid on this note March 11, 1882, ten dollars," and signed his name thereto. On the same day, Nelson Gay, one of the payees and holders of the note, charged George P. Hassom, on book, ten dollars as having been indorsed on the note. The master has found that the indorsement on the note and the charge on book represent the same transaction; that the only payment then made was the charge on book; and that the parties intended by the transaction to prevent the statute of limitations running on the mortgage. The orator's claim to the mortgaged premises is barred by lapse of time, unless his intestate's right of entry was kept alive by the transaction of March 11, 1882.

George P. Hassom, the maker of the note, having, on the back of the note over his signature, acknowledged that ten dollars were paid on the note; and one of the holders of the note having charged him ten dollars on book on account of the indorsement thus made, and forborne his right to enter and take possession of the mortgaged premises for more than fifteen years after the note was due; and both parties having intended the indorsement thus made to operate as would a payment sufficient to repel the presumption of payment of the note and take the mortgage out of the operation of the statute,—the Court will give effect to this intention of the parties. The making and signing of the indorsement under these circumstances was an acknowledgment and recognition of the mortgage debt, and is as effectual to rebut the presumption of payment and interrupt the running of the statute as if ten dollars had in fact been paid.

In the case of *Martin* v. *Bowker*, 19 Vt. 526, it is held that a payment of interest upon the mortgage debt, or any part of the principal, or any other act recognizing the existence of the mortgage and that the same is unsatisfied, will be sufficient to repel the presumption of payment and take the case out of the operation of the statute.

In *Burton* v. *Stevens*, 24 Vt. 131, the defendant wrote and

signed on the back of the notes these words, "I hereby agree that I will not take any advantage of the statnte of limitations on the within two notes;" and it was held that this was an acknowledgment sufficient to take the notes out of the operation of the statute, and that the defendant was technically estopped by this agreement from claiming the benefit of the statute. Isham, J., in delivering the opinion of the court, says: "It is evident that in making that agreement the defendant intended to place in the hands of the plaintiff sufficient evidence to protect his claim from the operation of the statute, and that the plaintiff in taking this agreement supposed that his claim was saved thereby from its operation. It is just and reasonable, therefore, that such an effect should be given to the agreement, if it can be consistent with the established rules of law."

In *Gardner* v. *McMahon*, 3 Q. B. (43 E. C. L. 870), Lord Denman, C. J., says: "When the debtor used the language, 'I will waive the statute,' it contains an acknowledgment of the debt and promise to pay. It may well be supposed that the creditor, on his part, has forborne to sue, *relying upon this undertaking* as preserving his right of action in the future."

In the case of *Corliss & Way* v. *Grow*, 58 Vt. 702, it is held that a part payment of a debt is an implied acknowledgment of the existence of the debt upon which the payment is made, from which the law implies a promise to pay the balance, unless such implication is rebutted by something that transpires at the time the payment is made. There is no reason why an acknowledgment in writing that a partial payment has been made, signed by the party affected thereby and acted upon by the creditor, should not be as effectual to repel the presumption of payment and interrupt the running of the statute as a part payment in fact; and we hold that such an acknowledgment is a sufficient fulfillment of the requirements of the statute. R. L. sec. 974.

This case is distinguishable from that of *Blanchard* v. *Blanchard*, 122 Mass, 558, relied upon by counsel for the defendant.

In that case, the indorsement was not signed by the maker of the note, and it would seem from the opinion, that, had it been so signed, it would have been held sufficient. The Massachusetts statute (Gen. Sts., chap. 155, sec. 13) relating to acknowledgment and promise, is similar to ours. Judge Endicott, in delivering the opinion of the court, after referring to this statute, says: "It is not contended that the indorsements on the notes were signed by the defendant, within the provisions of sec. 13. It is the act of payment on account of the debt, that takes the case out of the statute. It therefore necessarily follows, that an indorsement, which it is agreed does not represent such a payment, and is not signed by the party to be charged, cannot be made, by force of an oral agreement, evidence of a new and continuing contract. The effect of such evidence would be to defeat the operation of the statute, which can be done only by a writing duly signed, or by a real payment on account of the debt. It is contended by the plaintiff that the defendant is estopped to deny that the payment on the notes was properly indorsed. But an agreement ineffectual to take a case out of the operation of the statute, because not contained in writing signed by the party to be charged thereby, cannot work an estoppel."

We think George P. Hassom was estopped to deny that the indorsement was properly made, or that a payment was in fact made, and that the orator may avail himself of this under the issue formed by his replication to the defendant's answers. The holders of the note had a right to rely upon the indorsement as such an acknowledgment and recognition of the mortgage debt as would interrupt the running of the statute and keep alive their right of entry. Hassom intended they should so rely upon it. He placed the indorsement upon the note and signed it for that purpose. It would have been fraud in him to assert what his previous conduct and admission had denied, when others had acted on the faith of such conduct and admission. *Hicks & Co.* v. *Cram et al*, 17 Vt. 449; *Burton* v. *Stevens, supra; Hickok*

v. *Farmers' & Mechanics' Bank et al*, 35 Vt. 476; *Shaw* v. *Beebe et al*, 35 Vt. 205; *Manufacturer's Bank of Troy* v. *Scofield*, 39 Vt. 590; *Wheeler* v. *Willard*, 44 Vt. 640; *Montpelier and Wells River Railroad Co.* v. *Langdon*, 45 Vt. 137; *Soper* v. *Frank*, 47 Vt. 368.

In the case of the *Utica Insurance Co.* v. *Bloodgood*, 4 Wend. 652, the defendant signed a writing in these words, "I hereby agree not to plead the statute of limitations," and it was held that he was estopped from availing himself of the statute.

In *Stearns* v. *Admr. of Stearns*, 32 Vt. 678, the defendant agreed "that he would not take advantage of the statute of limitations on the note;" and it was held a sufficient acknowledgment to take the note out of the operation of the statute, and that the agreement need not be pleaded by way of estoppel, but could be shown under the issue formed by traversing the plea.

The payment thus indorsed and signed by Hassom had the effect to repel the presumption of payment and keep alive the right of entry, not only against him but also against all others having an interest in the equity of redemption. *Hollister* v. *York et al*, 59 Vt. 1; *Barrett, Admr.* v. *Prentiss et al*, 57 Vt. 297; *Tupper and Potter* v. *Rider and Wife*, 61 Vt. 69; *In re Chickering*, 56 Vt. 82.

In 2 Jones on Mortgages, sec. 1198, it is said, that, where several persons are interested in the equity of redemption, a payment by one of them keeps alive the right of entry, not only against him but also against all other owners of the equity. In *Barrett, Admr.* v. *Prentiss et al, supra*, partial payments were made by the maker of the notes and mortgage after he had sold and quit possession of the premises, and it was held that this rebutted the presumption of payment, not only as to him but to all others who were grantees under him.

If Naomi B. Hassom were a grantee of George P. Hassom, one of the mortgagors, she would be affected by the acknowl-

edgment thus made by him; and she is affected in no less degree by reason of being herself one of the mortgagors. But she claims that in equity she should be regarded as surety for the payment of her husband's note, and that, under our statute (R. L. sec. 976) relating to joint contractors, she is not affected by the payment or acknowledgment made by him. By joining with her husband in a mortgage of her real estate to secure his debt, she did not become a joint contractor.

She incurred no personal liability by so doing. The statute referred to has reference to parties incurring a personal liability and has no reference to a right of entry into houses and lands. The effect of the mortgage was to convey the premises conditionally to the mortgagees, and their right of entry could be defeated only by an actual payment of the mortgage debt, or by lapse of time sufficient to raise a presumption of payment. George P. Hassom was the husband of the owner of the mortgaged premises, and was, by reason of this relation, interested in the equity of redemption. He was also the only party personally liable for the payment of the mortgage debt, and he having within fifteen years recognized and acknowledged the same as unpaid, the presumption of payment is rebutted, and the case is one in which the law does not presume that the mortgage debt has been paid.

Decree affirmed and cause remanded.

JOSEPH H. ENRIGHT *v.* WILLIAM P. DODGE.

Chattel mortgage. Increase of animals.

1. The plaintiff's mortgage covered "one brown mare twelve or thirteen years old." When the mortgage was executed the mare was with foal, and the defendant subsequently bought the colt in good faith after it had ceased to follow the mother for the purpose of nurture. *Held*, that the plaintiff had no title to the colt as against the defendant, for it was not fairly embraced within the description, and the plaintiff had never taken possession of it.

2. Nor would it alter the case if the defendant was informed at the time of purchasing the colt, that the mother was mortgaged to the plaintiff, but the colt was not.

Trover for a colt. Plea, the general issue. Heard at the December term, 1889, Ross, J., presiding, upon an agreed statement of facts. Judgment for the defendant. The plaintiff excepts.

J. C. Enright and *J. J. Wilson*, for the plaintiff.

The plaintiff acquired title to the colt under his mortgage. *Clark* v. *Hayward et al*, 51 Vt. 14; *Boynton* v. *Bradley*, 54 Vt. 92; *Forman et al*, v. *Proctor et al*, 9 B. Monroe 124; *Thorpe Bros. & Co.* v. *Cowles et al*, 65 Iowa 408; *Kellogg* v. *Loveley*, 46 Mich. 130; *Evan et al*, v. *Meriken*, 8 G. & J. 39.

Geo. L. Fletcher, for the defendant, cited

Jones Chat. Mort., s. 150; *Buckmaster* v. *Smith*, 22 Vt. 203; *Church* v. *McLeod*, 58 Vt, 541; *Morgan* v. *Kidder & Robinson*, 55 Vt. 367; *Calkins* v. *Clement*, 54 Vt. 634.

The opinion of the court was delivered by

START, J. The plaintiff claims title to the colt in question under a chattel mortgage of its mother, in which the colt is in no way referred to, and its mother is described as "one brown

mare twelve or thirteen years old." The mare was with foal at the time the mortgage was executed, but the mortgage contained no reference to her use or increase. The colt was four months old, weaned, and in the possession of the mortgagor at the time the defendant in good faith bought it of the mortgagor, paying full value therefor. The defendant was told at the time of the sale that the mare was mortgaged to the plaintiff, but that the colt was not mortgaged or incumbered.

If the plaintiff had title to the colt by reason of this mortgage upon its mother, such title was in-operative as against a purchaser or attaching creditor, and the defendant acquired good title by his purchase of the mortgagor. R. L. 1966; *Parker* v. *Chase and Buck*, 62 Vt. 206; *Longey* v. *Leach*, 57 Vt. 377; *Darling* v. *Wilson*, 60 N. H. 59 (49 Am. Rept. 305); *Funk* v. *Pond*, 64 Wis. 35 (54 Am. Rept. 576); *Rogers* v. *Highland*, 69 Iowa 504 (58 Am. Rep. 230); *Morrill* v. *Noyes*, 56 Maine 458 (96 Am. Dec. 486).

R. L. 1966 provides that a mortgage of such personal property shall not be valid against any person except the mortgagor, his executors and administrators, unless the possession of the property is delivered to, and retained by, the mortgagee, or the mortgage is recorded in the office of the clerk of the town in which the mortgagor resides at the time of making the same, or if he resides out of the State, in the town in which the property is situated.

Before the enactment of this statute, a mortgage of personal property was void as against subsequent purchasers and attaching creditors, unless the mortgagee took and retained possession of the property. *Woodward* v. *Gates*, 9 Vt. 358; *Tobias* v. *Francis*, 3 Vt. 425; *Kendall* v. *Samson*, 12 Vt. 515. The only change made by this statute is to authorize the recording of the mortgage in lieu of possession of the mortgaged property by the mortgagee, and as equivalent to it. Such recording is constructive notice to third parties subsequently dealing with the prop-

erty of the rights and interest of the mortgagee. Such constructive notice is co-extensive with the contents of the mortgage so recorded; but, from the very nature of things, it cannot be constructive notice of a fact in no way referred to in it. The purpose of recording the mortgage is to give notice that the person in possession of the property is not the absolute owner; and to effectuate this purpose, there must be such a description of the chattel in the mortgage as will enable the purchaser or attaching creditor to discover the true state of the title. If the mortgage falls short of this, it does not answer the requirements of the statute, and is void as against all persons "except the mortgagor, his executors and administrators."

By the construction given to this statute in the case of *Parker* v. *Chase and Buck*, *supra*, every distinct chattel must be so described in the mortgage itself that a third person, aided by inquiry which the instrument itself suggests, will be able to identify it; nothing short of this will impart notice to a purchaser. The plaintiff's mortgage contained nothing to suggest inquiry in regard to the colt, therefore it was not constructive notice that the colt was mortgaged. At the time the defendant bought the colt, the period of nurture had passed. It was no longer connected with its mother for any purpose. It was a chattel, distinct from its mother. Being a distinct chattel, it was not included within the description of the mother nor an incident of the mortgage. There was nothing in its then relation to its mother to suggest that it was incumbered by the mortgage upon her. There is nothing in the description, "one brown mare twelve or thirteen years old," to suggest that a colt four months old, and no longer following its mother for nurture, is mortgaged. The colt would not have been a chattel more distinct and separate from its mother if it had been five years old. It was such a chattel as the law requires the mortgagee to have in his possession or described in a recorded mortgage.

But it is claimed that the notice given to the defendant at

the time of sale, that the mother was mortgaged, was sufficient to suggest inquiry in regard to the ownership of the colt. The notice thus given was, in effect, nothing more than the constructive notice given by the recording of the mortgage. The colt being a chattel distinct from its mother, the record of the mortgage was only notice that she was mortgaged. The notice given at the time of the sale was nothing more. If he had examined the record of the mortgage, he would have found nothing to suggest the necessity of inquiry as to the ownership of the colt; such examination would only confirm the statement made by the mortgagor that the colt was not mortgaged. He had such notice only of title in the mortgagee as the mortgage itself gave purchasers and attaching creditors, and it is immaterial whether the notice was actual or constructive. *Longey* v. *Leach, supra.* There was nothing in the actual or constructive notice to suggest an inquiry that would enable the defendant to discover any title to the colt that would be superior to his own as purchaser. If he had received notice before the sale of all the facts now disclosed, the plaintiff's title would be inoperative as against him. Such notice would be only notice of a title in the plaintiff that the law declares inoperative as against him. The plaintiff has not observed the law relating to chattel mortgages. He did not have possession of the colt, nor did he have on record a mortgage in which it was described with sufficient definiteness to enable a purchaser or attaching creditor, aided by inquiry suggested by the instrument itself, to discover his title. Having neither possession nor such a mortgage on record, his title is inoperative as against all persons "except the mortgagor, his executors and administrators."

Judgment affirmed.

REUBEN TAYLOR *v.* JOHN C. COOLIDGE.

False imprisonment under tax warrant. Damages. Interest. Direction of verdict. Exceptions must be taken below.

1. **Evidence of an arrest and restraint upon an illegal warrant will support an action for false imprisonment, although there is in fact no commitment to or confinement in jail.**

2. **It appeared that the defendant arrested the plaintiff upon a tax warrant and transported him to Woodstock for the purpose of committing him to jail, whereupon the plaintiff paid the tax and was set at liberty. Upon the trial the court said that unless there was some question which the parties desired to present to the jury, he would hold the warrant illegal and direct a verdict for the plaintiff. *Held*, that the defendant, having made no claim in that respect then, could not in Supreme Court insist that the question whether the plaintiff consented to the arrest should have been submitted to the jury.**

3. **In an action for false imprisonment the plaintiff may recover as damages the amount of a tax paid by him to obtain his release from restraint under an illegal tax warrant, although the tax itself was a valid one against the plaintiff.**

4. **The court might properly direct a verdict for the amount so paid.**

5. **But interest was not recoverable *eo nomine* as matter of law, and the court having directed a verdict for the amount paid, with interest, the judgment of the County Court will be reversed, and judgment given for the amount paid, without interest.**

6. **The statute requiring actions for the recovery of taxes paid under protest to be brought within one year, No. 8, Acts 1884, has no application to a suit for a false imprisonment, whereby the payment of the tax was compelled.**

Trespass for false imprisonment. Plea, the general issue with notice of justification under a tax warrant. Trial by jury at the May term, 1891, Ross, Ch. J., presiding. The Court directed a verdict for the plaintiff. Exceptions by the defendant.

Reuben Taylor *v.* John C. Coolidge.

The evidence of the plaintiff tended to show that on or about the 19th day of May, 1885, he was arrested by the defendant, at Plymouth, and transported to Woodstock for the purpose of being committed to the public jail, and that he was compelled to pay, and did pay, in Woodstock, the sum of $49.73 to procure his release from such restraint.

The defendant justified as the collector of taxes for the town of Plymouth for the year 1885. The tax in question was a highway tax assessed upon the grand list of 1882. The grand list and the original assessment of the tax, were in all respects legal, and the tax was a valid tax as against the plaintiff. In 1882 the selectmen of the town of Plymouth issued a rate-bill containing this tax against the plaintiff and the plaintiff paid a portion of it, leaving still due the sum of $40.92. In 1885 the selectmen of the town of Plymouth for that year, attached a new warrant to this same rate bill and placed it in the hands of the defendant for collection. Under this warrant the defendant demanded the amount of the unpaid tax from the plaintiff, and upon his refusing to pay the same, took him into custody and carried him to Woodstock, whereupon the plaintiff paid the defendant the amount of said tax and the costs of collection, amounting in all to $49.73. There was some evidence in the case tending to show that the plaintiff consented that the defendant might arrest and commit him to jail, as is fully stated in the opinion of the court.

The court directed a verdict for the plaintiff for the sum of $67.63, and costs, that being the amount paid by the plaintiff to procure his discharge together with interest from the date of such payment to the time of trial. To this action of the court the defendant excepted.

W. W. Stickney, and *W. E. Johnson*, for the defendant.

The plaintiff paid the defendant the amount of this tax under protest, and the suit for its recovery should have been brought within one year. No. 8, Acts of 1884.

The court erred in directing the verdict.

a. There was evidence in the case tending to show that the plaintiff consented to the restraint. *Ellis* v. *Cleveland*, 54 Vt. 437.

b. In actions of tort the court can only direct a verdict for the plaintiff in nominal damages. Thomp. Tr. p. 1472 *et seq.*; *Benjamin* v. *Hillard*, 23 How. 149; *Worster* v. *Canal Bridge*, 16 Pick. 541; *Kimball* v. *Bath*, 38 Me. 219.

c. What the plaintiff paid was a tax actually due from him to the town. Hence the damages should have been mitigated to the extent of that tax. *Hurlburt* v. *Green*, 41 Vt. 490; *Pierce* v. *Benjamin*, 14 Pick 356.

d. The plaintiff was not entitled to interest as matter of law. 2 Thomp. Tr. s. 2066; *Richmond* v. *Bronson*, 5 Denio. 55; *Watkinson* v. *Laughton*, 8 Johns. 213; *Clement* v. *Spear*, 56 Vt. 401.

Gilbert A. Davis, for the plaintiff.

The court properly directed a verdict. The warrant under which the defendant acted was illegal, and, therefore, his justification failed. No. 12, Acts of 1884, s. 9.

No. 8, Acts of 1884, only applies to actions in assumpsit for the recovery of taxes paid under protest. *B. F. Canal Co.* v. *Rockingham*, 37 Vt. 622; *Spear* v. *Town of Braintree*, 24 Vt. 414; *Vt. Cent. Rd. Co.* v. *Burlington*, 28 Vt. 193; *Slack* v. *Norwich*, 32 Vt. 818.

The fact that the tax was actually due from the plaintiff has no bearing upon the damages in this suit. The arrest and confinement were illegal. *Hull* v. *Ray*, 40 Vt. 576; *Irish* v. *Cloyes & Morse*, 8 Vt. 39; *Stewart* v. *Martin*, 16 Vt. 397.

There was no error in including interest in the verdict. *Lindsley* v. *Danville*, 46 Vt. 144; *Thrall* v. *Lathrop*, 30 Vt. 307; *Grant* v. *King et al*, 14 Vt. 367.

The opinion of the court was delivered by

TYLER, J. It is not claimed in the brief of the defendant's counsel that the warrant attached to this tax-bill was legal. Under the law existing when the tax of 1882 was assessed, the selectmen, on or before June 1, 1883, should have delivered a list of the unpaid taxes to the collector of town taxes, who should have collected and paid the same to the treasurer on or before the first of the following August. R. L. 3053. Even this provision of the statute had been repealed when the selectmen placed the warrant in the hands of the defendant, in May, 1885. Acts of 1884, No. 12.

If the defendant arrested the intestate upon this warrant he thereby rendered himself liable for a false imprisonment, which is defined to be a trespass committed by one man against the person of another by unlawfully arresting and detaining him without any legal authority. 2 Add. on Torts, s. 798. It was not necesssary that there should be an actual confinement in jail. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 3 Black. Com. 127.

But the defendant's counsel argue that there was evidence in the case which tended to show that the restraint of the intestate's liberty was not against his will but with his consent. The exceptions state that the defendant testified that the intestate told him that he had no personal estate out of which he could satisfy the tax, and that the intestate or his son suggested to the defendant that he had better take the intestate to jail, and that the intestate fixed his own time to be taken there. By agreement of counsel a transcript of the testimony taken in the case was passed up, from which it appears that the plaintiff's evidence tended to show that the defendant gave the intestate the alternative to pay his tax or go to jail. The defendant's return upon the warrant states that the intestate, on the 16th day of May, re-

quested to be carried to jail, that a delay was granted at his request until the 19th, when the defendant arrested him and transported him to Woodstock where he paid the tax and costs. Whether the evidence upon this point was conflicting or not is not material, for the transcript before us shows that the defendant's counsel did not ask to go to the jury upon the question of consent; that the Court said to counsel that unless there was some question which they desired to present to the jury he would hold the warrant unlawful, leaving only the question of damages to be determined, and the case shows no exception to this ruling.

The only question before this Court is in respect to the damages that the plaintiff might recover. The warrant was illegal, and all the acts which the defendant did by virtue of it—the arrest, detention, transporting to jail and taking the intestate's money—were unlawful, and the plaintiff was entitled to a verdict. An invasion of a legal right always imports some damages, though no pecuniary loss results therefrom. Rob. Dig. 231, pl. 2, 3. The direction of the Court for nominal damages certainly was favorable to the defendant.

The tax and costs were paid by the intestate under duress, as an incident of the arrest and detention. The taking the money was a part and parcel of the trespass, and the plaintiff was entitled to recover back the sum paid to procure his release. In actions of this kind the .plaintiff is entitled to recover such general damages as are the common and ordinary result of the wrongful act. *Page* v. *Mitchell*, 13 Mich. 63, (86 Am. Dec. 75); Rob. Dig. 222, pl. 6. Loss of money is as much a consequence of the trespass as loss of time, injury to health or deprivation of liberty. As the plaintiff was entitled as matter of law to recover the $49.73, and as no computation was required, there was no question of fact to be submitted to the jury.

No. 8, Laws of 1884, has no application to this case. That act provides that, suits to recover money paid under protest for taxes, shall be commenced within one year after the cause of

action accrues. This action is for a wrongful arrest and detention, and the money paid is claimed as an element of damages.

The Court directed the jury to add interest to the amount paid by the intestate to the defendant; in this there was error. The plaintiff was not entitled to interest as a matter of law. Whether interest should be allowed in actions of tort is a question of fact for the jury, and when allowed it is as a part of the damages—not strictly as interest.

Therefore the judgment must be reversed and judgment for the plaintiff to recover the sum of $49.73.

JAMES G. BATES *v.* WILLIAM H. SABIN.

Adjournment of County Court. To place other than court house. By a single judge. Error must affirmatively appear. Statute of limitations. Items of credit not claimed, Wife not a witness. Services performed on Sunday. Statute of frauds. Novation. Administrator may recover in individual capacity for debt due estate. Computation of interest. Memorandum books as evidence.

1. The County Court for the county of Windsor may be adjourned from the court house to the residence of one of the assistant judges in Woodstock.
2. The presiding judge alone may make such adjournment if the two assistant judges are disqualified from acting.
3. Sickness is a legal disqualification; and where the exceptions state that one assistant judge was confined to his house by ill health and that the other was absent, error in making the adjournment does not affirmatively appear, for it is the duty of the assistant judge to be present unless disqualified, and the presumption is that he does his duty.

4. In an action of book account one party may credit the other with items, which are proper items of credit, and thereby avoid the operation of the statute of limitations, although the other party claims nothing by reason of such items and insists that they should not be credited to him.

5. The defendant directed his wife to pay the plaintiff for certain services and the wife did pay him in the presence of her husband. *Held*, that the wife was not a competent witness to this fact, for that in the making of such payment she was not the agent of her husband.

6. The auditor reported, in respect to certain items which he allowed the plaintiff, that they were for services performed on Sunday. *Held*, that the allowance by the auditor would not be set aside in Supreme Court since it did not affirmatively appear that the service was performed before sunset on Sunday nor that it was not a work of charity or necessity.

7. The defendant being indebted to C and C being indebted to the plaintiff, it was agreed between the three that the plaintiff should discharge C and that the defendant should pay the plaintiff the amount which he owed C. *Held*, that this promise of the defendant was an original one and not within the statute of frauds.

8. The plaintiff may recover in his individual capacity for material sold by him to the defendant, although the material belonged to an estate of which the plaintiff was the administrator, and although the plaintiff has not accounted to said estate for the same.

9. The auditor not having been requested to report what method he used in the computation of interest, the judgment of the County Court accepting the report will not be reversed, because it does not appear from the report what method he adopted, nor how he could have arrived at the result in respect of interest which he did.

10. Memorandum books, though not independent evidence, are admissible in connection with the testimony of the one who kept them.

11. A party may testify to services performed by him in serving certain writs without the production of the writs themselves.

Book account. Heard on the report of an auditor at the December term, 1891, Taft, J., presiding. Judgment *pro forma* for the plaintiff for the amount found due by the auditor. The defendant excepts. The opinion states the case.

Gilbert A. Davis and *Norman Paul*, for the defendant.

The adjournment to the house of Judge Marsh was illegal.

(*a.*) A county court is to be holden at the court house and at the times and places appointed by law. R. L. ss. 2562; 796; *French* v. *Barre*, 58 Vt. 575.

(*b.*) It is only when two judges are disqualified that one may try a case pending therein. R. L. s. 797.

One judge may adjourn until a quorum convenes. R. L. s. 803. But this was not such an adjournment. *Hoar* v. *Commissioners*, 2 Vt. 402.

The plaintiff had no right under the circumstances of this case to remove the bar of the statute of limitations by giving the defendant credit for items which he had never charged, and for which he did not claim payment. Ang. Lim., p. 140, 141, and 142; *Hodge* v. *Hanley*, 25 Vt. 210; *Austin* v. *McClure*, 60 Vt. 453.

The wife was the agent of her husband, and, therefore, a competent witness. R. L. s. 1005; acts of 1888, No. 45; *Lunay* v. *Pantyne*, 40 Vt. 501; *Pierce* v. *Bradford*, 23 Atl. Rep. 637.

The plaintiffs memorandum books were improperly admitted. *Parris* v. *Bellows*, 52 Vt. 531; *Baird* v. *Fletcher*, 50 Vt. 603; *Lapham* v. *Kelley*, 35 Vt. 195; *Cross* v. *Bartholomew*, 42 Vt. 206; *Colding* v. *Orcutt*, 44 Vt. 54.

The plaintiff cannot recover in this suit what was due him as administrater. Croswell on Exrs. and Admrs. 448; *Haskell* v. *Bowen*, 44 Vt. 579; *Smith* v. *Purmort's Admrs.* 63 Vt. 378.

William Batchelder, and *William E. Johnson*, for the plaintiff.

The wife was not a competent witness. She was not the agent of her husband within the meaning of the statute. *Eastabrooks* v. *Prentiss*, 34 Vt. 457; *Orcutt* v. *Cook's Estate*, 37 Vt. 515; 2 Kent. Com. 612.

The auditor has found that the items of credit allowed the defendant by which the statute bar is removed, were proper items

of credit, and that finding is conclusive. *Wood* v. *Barney*, 2 Vt. 369; *Fay et al.* v. *Green*, 2 Aik. 386; *Rixford* v. *Miller*, 49 Vt. 319; *Bagley* v. *Moulton*, 42 Vt. 184.

The plaintiff may recover in this suit the amount due him as administrator. *Aiken* v. *Bridgman*, 37 Vt. 250; *Adams* v. *Campbell*, 4 Vt. 447; *Manwell* v. *Briggs*, 17 Vt. 176; *White* v. *Pulley*, 27 Fed. Rep. 436; *Haskell* v. *Bowen*, 44 Vt. 579; *Rix* v. *Adams*, 26 Vt. 384.

The mere fact that the service was performed on Sunday is not enough to reverse the auditor's allowance of the amount due for that service. *May et al.* v. *Brownell*, 3 Vt. 463; *Clark* v. *Whipple*, 12 Vt. 483; *Bradstreet* v. *Bank of Royalton*, 42 Vt. 128; *Wait* v. *Johnson*, 24 Vt. 112; *Nason* v. *Dinsmore*, 34 Me. 391; R. L. s. 4315.

The presumption is, that the auditor computed the interest correctly, and the contrary does not appear from the report. *Cobleigh* v. *Stone*, 29 Vt. 525.

The agreement of the defendant to pay the plaintiff the amount of Crosby's debt was not within the statute of frauds. *Watson* v. *Jacobs*, 29 Vt. 169; *Anderson* v. *Davis*, 9 Vt. 136; *Williams* v. *Little*, 35 Vt. 323; *Fullam* v. *Adams*, 37 Vt. 394.

The plaintiff's memorandum books were admissible in connection with his testimony. *Soules* v. *Burton*, 36 Vt. 652; *Lapham* v. *Kelley*, 35 Vt. 195; *Cross* v. *Bartholomew*, 42 Vt. 206.

The presiding judge had power to adjourn as he did. The statute does not limit the place in Woodstock where the County Court shall be held. Com. St., Chap. 46, s. 5.

Moreover upon the exceptions the presiding judge might have disposed of the case alone, the presumption being that the other two were disqualified. R. L. s. 797.

The opinion of the court was delivered by

START, J. 1. On the 31st day of December, 1891, the Windsor County Court took a recess until the 9th day of Janu-

ary, 1892, at which time R. S. Taft, the presiding judge, was present; William Rounds, assistant judge, was absent; Charles P. Marsh, assistant judge, was ill at, and unable to leave, his residence, situated in the village of Woodstock a short distance from the court house. The court adjourned to the residence of Judge Marsh, and there rendered judgment *pro forma* for the plaintiff. The defendant excepted to the action of the court in adjourning to, and rendering judgment at, Judge Marsh's residence.

The Compiled Statutes, chap. 46, sec. 5, provides that the County Court for Windsor county shall be held at Woodstock, and the place of holding the court does not appear to have been more definitely fixed by any statute. R. L. sec. 804, provides that the Supreme and County Courts, when the state of business requires it, may adjourn their respective courts within the county in which they are usually held to any day previous to the next stated term. The power of the County Court for Windsor county in respect to time and place of adjournment is not limited, except as provided in the section above referred to; it had power to adjourn to Judge Marsh's residence, and the adjournment by the presiding judge must be regarded as the act of the court.

R. L., sec. 797, provides that one judge of the County Court may try and determine causes pending in such court, when the other judges are disqualified. The power thus conferred necessarily includes the power to adjourn the court, and, in this respect, the presiding judge had the same authority that is given to County Courts by sec. 804 of R. L. Judge Marsh was sick and unable to go to the court house. This was a legal disqualification. In *State* v. *Blair et al.*, 53 Vt. 24, it is held that legal disqualification in a judge may originate in physical causes, as well as interest or relationship. It does not appear why Judge Rounds was not present. It was his duty to be present, unless he was physically or otherwise disqualified; and this court will not pre-

sume that he did not do his duty. He may have been disqualified. Error must appear in order to justify this Court in reversing the judgment of the court below. The presumption is that there is no error, when, from the statement in the exceptions, none appears affirmatively. *McNeish* v. *U. S. Hulless Oat Co.*, 57 Vt. 316.

2. The statute of limitations is a bar to the plaintiff's recovery, unless his account is taken out of its operation by certain credits allowed to the defendant by the auditor. In respect to these credits, the auditor finds, that it was agreed between the parties that the defendant should furnish the plaintiff board at twenty-five cents a meal; that, under this agreement, the plaintiff had board at the defendant's house, but that the defendant testified that he claimed nothing for board after September 3, 1883, and had no charge for the same after that date. The auditor has found that this agreement was not limited as to time, and that the items for board subsequent to September 3, 1883, allowed by him, are proper items of credit. It is not claimed that the evidence did not tend to show that the board was a proper item of credit; and, the auditor having so found, his finding is conclusive. *Rixford* v. *Miller, Bort and Van Vetchten*, 49 Vt. 319. The item of board being a proper credit to the defendant, the plaintiff's account is saved from the operation of the statute. *Chapman* v. *Goodrich*, 55 Vt. 354.

In *Davis* v. *Smith*, 48 Vt. 52, it was held, that, in matters of account, one party may credit to the other items that represent a legal indebtedness that should go into the account and thereby avoid the bar of the statute of limitations, although the other party has not charged such items and insists that they should not be allowed him.

3. Items 144 and 145 of the plaintiff's specification are for services and expenses incurred in attending court as a witness for the defendant. The auditor finds that the defendant directed his wife to pay his witnesses, and, from the testimony of the de-

fendant's wife, finds that she did pay the plaintiff in the presence of her husband. If the defendant's wife was a competent witness under the circumstances, the auditor finds these items should be disallowed; otherwise, they should be allowed.

The competency of the defendant's wife as a witness under the circumstances reported by the auditor depends upon the construction to be given No. 45 of the Acts of 1886. This act provides, that, in matters of business transactions conducted by a husband as the agent of the wife, or by the wife as the agent of her husband, both husband and wife shall be competent witnesses for each other. The claimed payment was made by the wife by direction of the husband and in his presence. Can it be said that this was a business transaction had and conducted by the wife as the agent of her husband? We think not. The transaction must be regarded as having been conducted by himself. It cannot be said that this business was had with and conducted by his agent, when he was present and directed to be done just what was done. The statute clearly has reference to business transactions conducted by the wife as the agent of her husband, of which he has no personal knowledge.

So far as the Act of 1886 rélates to the right of the wife to testify as to transactions conducted by her as the agent of her husband, it is substantially like No. 13 of the Acts of 1858. In *Eastabrooks* v. *Prentiss*, 34 Vt. 457, it was held that the plaintiff's wife was not a competent witness under the act of 1858 to show the state of the plaintiff's accounts, kept by her from original memoranda made by the plaintiff. Bennett, J., in delivering the opinion of the court, says: "It is well understood, as the entire scope and language of the statute indicates, that the purpose of that provision was to enable proof to be made of transactions of which the husband had no personal knowledge, and the wife had, for the reason that she personally negotiated, as a substitute for, and in the place of, her husband in such transactions."

James G. Bates *v.* William H. Sabin.

This case is distinguishable from that of *Pierce* v. *Bradford*, decided at the last General Term of this conrt and reported *ante*. In that case the defendant offered to show by his wife an act done by her as his agent, in his absence, and of which he had no personal knowledge.

4. Item 26 of the plaintiff's specification is for service performed on Sunday, and items 27 and 28 are for expenses attending this service. The defendant claims these items should have been disallowed by the auditor. R. L. s. 4315, provides that a person, who, between twelve o'clock Saturday night and sunset on the following Sunday, exercises any business or employment except such only as works of necessity and charity, shall be fined not more than two dollars. If it was unlawful for the plaintiffs to perform the service charged for, at the time he performed it, these items should have been disallowed. Whether the service was a work of necessity or charity was a question of fact to be determined by the auditor. *Commonwealth* v. *Gillespie*, 146 Pa. 546, (23 Atl. Rep. 393.)

The finding of the auditor that the work was performed on Sunday is not equivalent to a finding that the service was performed between twelve o'clock Saturday night and sunset on the following Sunday, or that the service was not work of necessity or charity; and, he having allowed these items, it will not be presumed that the service was illegal. The presumption is that it was lawful for the plaintiff to perform the service. We cannot presume that the service was not one of necessity or charity, nor that it was not performed after sunset on Sunday. All reasonable intendments are to be made in support of the conclusions and judgment of an auditor and the County Court. *Bradstreet* v. *Bank of Royalton*, 42 Vt. 128. It not appearing that the service was not work of necessity or charity, nor that the service was performed between twelve o'clock Saturday night and sunset on the following Sunday, there is no legal objection to a recovery for these items. *Nason* v. *Dinsmore*, 34 Me. 391.

5. Item 39 was not within the statute of frauds and was properly allowed. The auditor, in effect, finds, that the defendant was owing one A. J. Crosby; that Crosby was owing the plaintiff; that the defendant told Crosby to settle with the plaintiff who was doing business for him, whereupon Crosby and the plaintiff settled the account Crosby had against the defendant by offsetting the same against the plaintiff's account against Crosby; and that the defendant agreed that he would pay the plaintiff the amount thus paid to Crosby for him. This was not an agreement to pay Crosby's debt. The plaintiff, by direction of the defendant, extinguished a debt owing from the defendant to Crosby; and, in effect, the plaintiff has paid out the sum charged for the benefit of the defendant, and at his request.

6. The defendant claims that item 139 of the plaintiff's specification should have been disallowed by the County Court. The auditor finds that the plaintiff was administrator of the estate of Taylor Alexander, and kept some cattle for the defendant on hay, straw and corn-fodder belonging to said estate, and that he has not accounted to said estate for the same. The defendant's contract for the keeping of his cattle was made with the plaintiff, his promise was to pay the plaintiff, and the defendant's liability is in no way dependent upon the plaintiff's accounting to the estate he represents for this item. The defendant is accountable to the plaintiff only, and it is immaterial to him whether the plaintiff has accounted to the estate as it was his duty to do. The defendant is not excused from performing his undertaking to pay the plaintiff, because the plaintiff has been remiss in the performance of his duty in matters in which the defendant is in no way concerned, and by which he can in no way be affected. *Haskell* v. *Bowen*, 44 Vt. 579.

The plaintiff can recover this item in this action, notwithstanding he has declared in his individual capacity. The privity of contract is not between the defendant and the estate; there was no contract with, or promise to, the plaintiff's intestate. The

contract is between the parties as individuals, and as between them is personal, and there was no occasion for the plaintiff to declare in his representative capacity. He had a right, as between himself and the defendant, to treat himself as a debtor of the estate to the amount of this item, and the defendant his own debtor, and sue thereon in his individual capacity. *Aiken* v. *Bridgman*, 37 Vt. 249.

The contract having been made with the plaintiff personally there is no legal objection to including this cause of action in an action to recover for causes of action accruing to him in his own right. They are all causes of action for which he may recover without declaring in a representative capacity. They all accrued to him and are properly joined in the same action. *Haskell* v. *Bowen, supra; Rix* v. *Nevins*, 26 Vt. 384; *Pope* v. *Stacy*, 28 Vt. 96; *Hutchinson* v. *Ford*, 62 Vt. 97.

7. The defendant insists that judgment should be reversed because the auditor has not stated in his report the method adopted by him in computing interest, and because it is impossible to determine from the report how he found as he did upon the item of interest. There is nothing in the report that would justify this court in so holding. It does not appear that the auditor was requested to report his method of computing interest. He was under no obligation to do so unless requested. It not appearing that he adopted a wrong method, the court will not presume error for the purpose of reversing the judgment. If the defendant does not know what rule was adopted by the auditor, it is his own fault. He might have known by requesting him to report his method of computation.

8. There was no error in the ruling of the auditor in admitting the plaintiff's memorandum books. We understand from the report that they were not admitted as independent evidence, or considered by the auditor as such, but were received and considered in connection with the plaintiff's evidence; in

this connection they were admissible. *Soules & Sherman* v. *Burton*, 36 Vt. 652; *Lapham* v. *Kelly*, 35 Vt. 195.

9. The testimony of the plaintiff relating to services performed for the defendant by serving writs in which the defendant was plaintiff, was properly received. The writs were returnable process, and, presumably, had been returned to the court from which they issued. There was no question before the auditor which required their production. The plaintiff sought to recover for services performed under an agreement by which he was to have two dollars a day and his expenses, and he was under no obligation to produce the instruments in respect to which he performed the service. *Houghton* v. *Est. of Paine*, 29 Vt. 58; *Hayden* v. *Rice*, 18 Vt., 353; *Goodrich* v. *Mott*, 9 Vt. 395.

10. The finding of the auditor that the plaintiff performed services in and about getting money at the Woodstock bank, at the request of the defendant and for his benefit, is conclusive upon the question of the defendant's liability therefor.

The defendant claims that these causes of action are merged in a note given by the defendant to the plaintiff, but the auditor has not so found, and no facts are reported from which the court can hold, as a matter of law, that they are so merged.

Judgment affirmed as of the date it was rendered by the County Court.

WILLIAM M. KENDALL *v.* TRACY, HATHAWAY & HATHAWAY.

Mortgage. Payment by Mortgagor. Estoppel. Betterments.

1. A payment by the mortgagor within fifteen years prevents the running of the statute as to the entire premises, notwithstanding the mortgagor, to the knowledge of the mortgagee, has conveyed a portion of the same to a third party, who has been in the exclusive occupancy thereof for more than fifteen years, without making any payment upon or otherwise recognizing the mortgage debt.
2. In such case the mortgagee is not estopped from asserting his lien by the fact that he has stood by and seen the grantee expend large sums upon the granted portion, it not appearing that the grantee was misled by the mortgagee.
3. Nor is the grantee entitled to betterments, if he knew of the existence of the mortgage when he accepted the conveyance.

Petition to foreclose a mortgage. Heard on bill, answer, and a master's report, at the December term, 1889. Ross, chancellor, decreed foreclosure as to all the defendants. The defendants Hathaway appeal. The opinion states the case.

J. G. Harvey and *D. C. Denison*, for the petitioner.

A payment having been made on the note within fifteen years, the mortgage is in force as against the entire premises. *Richmond* v. *Aiken*, 25 Vt. 234; *Wiers & Peck* v. *Nelson*, 26 Vt. 13; *Wright & Ainsworth* v. *Lake*, 30 Vt. 206; *Townsend* v. *Downer*, 32 Vt. 183; Robert's Digest 553; *Hollister* v. *Young*, 59 Vt. 1.

Norman Paul, for the defendants Hathaway.

Equity follows the law and a suit in ejectment would not lie for the land occupied by the Hathaways'. R. L. s. 951; I Sto. Eq. Jur., ss. 64 a, 529; *Martin* v. *Bowker*, 19 Vt. 526; *Dexter*

et al, v. *Arnold*, 1 Sumner, 109; *Same* v. *Same*, 3 Sumner, 152; *Pratt* v. *Vattier*, 9 Peters, 405; *Miller* v. *McIntyre*, 6 Peters; 61; *Carlson* v. *Walton*, 9 Peters, 62; *Crittenden* v. *Brainard*, 2 Root, 485; *Skinner* v. *Smith*, 1 Day 124; *Bunce et al*, v. *Wolcott*, 2 Conn. 27; *Collidge* v. *Learned*, 8 Pick. 508; *Giles* v. *Baremore et al*, 5 Johns. Ch. 545.

Payments made by the original mortgagor would not affect their rights. 2 Jones Mort. s. 1198; *Hubbard* v. *Mo. Valley L. Ins. Co.*, 25 Kan. 172; *Schmuker* v. *Sibert*, 18 Kan. 104; *Alms House Farm Masters* v. *Smith*, 52 Conn. 434.

The petitioner is estopped. 2 Sto. Eq. Jur., s. 1546; 2 Jones Mort., s. 1189; *Wheeler* v. *Willard*, 44 Vt. 640; *Faxton* v. *Faxton*, 28 Mich. 159; *Miller* v. *Bingham et al*, 29 Vt. 82; *Wright* v. *Whitehead et al*, 14 Vt. 268; *Stafford* v. *Baldwin et al*, 17 Vt. 329; *Green* v. *Smith*, 57 Vt. 268; *Sneed* v. *Osborne*, 25 Cal. 619; *Calumet* v. *Pacheco*, 48 Cal. 391; *Woods* v. *Wilson*, 37 Penn., St. 379; *Harcourt* v. *White*, 28 Beav. 303; *Swain* v. *Seamans*, 9 Wall. 254; *Duke of Beaufort* v. *Patrick*, 17 Beav. 60; *Carr* v. *Wallace*, 7 Watts, 394.

The defendants are at least entitled to betterments. *Morgan* v. *Walbridge and Chase*, 56 Vt. 405; 2 Sto. Eq. Jur., s. 1237; *McLaughlin* v. *Barron*, 31 Md. 425.

The opinion of the court was delivered by

TYLER, J. This is a petition to foreclose a mortgage. It was taken as confessed as to the defendant Tracy. Defendants Hathaway answered, claiming the benefit of the statute of limitations, and the case was referred to a master, who reported that the petitioner, Jan. 2, 1866, sold and conveyed a farm in Hartland to defendant Tracy and took back from him a mortgage on the farm to secure the payment of Tracy's promissory note of that date for $2,600, payable to the petitioner on demand with interest annually; that Dec. 23, 1871, Tracy, by a warranty deed conveyed a small piece of the mortgaged land, worth $100, for a mill-site, and $15 for farming purposes, to the Hathaways,

for the nominal consideration of $400, but in fact, for the consideration that the grantees would build a dam and saw mill upon the land conveyed to them. The deed of this land was drawn for the petitioner and Tracy to sign, but it was never presented to the petitioner for that purpose, nor was he requested to execute it. It was executed by Tracy and delivered to the Hathaways, who caused it to be recorded, and in the year 1872 built a dam upon the stream, also a grist mill, saw mill and cider mill, at the expense or about $5,000. When the Hathaways took their deed they knew that the land conveyed to them was covered by the mortgage to the petitioner, but nothing was ever said between them and the petitioner or between the latter and Tracy in regard to the mortgage. The petitioner knew that the Hathaways were intending to build the mills and was frequently on the site when they were being built, and has been at the mills several times a year since they were completed. Some years before the Hathaways took their deed the petitioner offered to give them this site if they would erect mills upon it, "but nothing was done towards it at that time." The Hathaways have occupied and operated the mills since they were built, claiming title thereto, and have paid nothing on the mortgage debt, nor recognized it, nor recognized that the petitioner had any interest in the land. Tracy from time to time made payments on the note so that it never became barred by the statute of limitations as to him. The master further finds that the Hathaways supposed that they had good title to the property; also that the farm is increased in value by the mills being built upon it more than the value of the mill site, that the farm is now worth $2,500, the mills and site $2,000, and that there is due the petitioner on the mortgage debt $4,899.99.

1. The doctrine of estoppel has no application here. The petitioner did not say or do anything to mislead the defendants, nor was he bound to speak when he remained silent. He in fact had no knowledge in regard to the mortgage, aside from the

amount of it, which they did not possess. It does not appear that the defendants acted upon anything that the petitioner said or did in erecting their buildings upon the mortgaged premises. The defendants supposed that their deed gave them a good title, but it is not found that the petitioner knew that they so supposed. The petitioner might reasonably have believed that the defendants relied upon their grantor relieving the land from the mortgage, and they must be presumed to have known the law as to their rights and liabilities.

2. The defendants cannot avail themselves of the statute of limitations. They could acquire by their deed no better title than Tracy had, which title he held subject to the petitioner's mortgage, and that mortgage was kept from the operation of the statute by payments made by Tracy to the petitioner.

A payment of interest or part of the principal renews the mortgage, so that an action may be brought to enforce it within the statutable period thereafter. 2 Jones on Mort. s. 1198. In *Richmond* v. *Aiken et al*, 25 Vt. 324, it was held that the mortgagee's right of entry upon land was not lost, either by presumption or the statute of limitations, except by a continued interruption and ouster for the term of fifteen years, and that this interruption or ouster ceases upon the acknowledgment of the title of the mortgagee by the owner of the equity of redemption; that his acknowledgment was binding upon his interest in the land and upon those who claimed an interest under him; that the mortgage being upon record they must be regarded as having constructive notice of it and of its continual subsistence, inasmuch as the record put them upon inquiry and affected them with notice of every fact which they might have learned upon inquiry.

In *Hollister* v. *York et al*, 59 Vt. 1, it was held that a payment of the interest or part of the principal of a mortgage debt by one of several parties who are interested in an equity of redemption, and who have had constructive notice, repels the pre-

sumption that the mortgage has been paid, and takes the case out of the operation of the statute of limitations, not only as to the payer, but as to all the owners of the equity; that the mortgagee could not be deprived of the security given by the mortgage by any conveyances that might be made by the mortgagor or his grantees. *Hughes* v. *Edwards*, 9 Wheat. 489.

In *Heyer* v. *Pruyn*, 7 Paige 465, it was held that the purchaser of a mortgaged farm within twenty years recognized the existence of the mortgage as a subsisting encumbrance; that neither he nor those deriving titles under him could set up the statute as a bar to a foreclosure suit; that a purchaser with actual notice, or constructive notice by the registry, is bound by a previous acknowledgment of the one under whom he claims. In the elaborate note to this case (Law. Ed.) it is said that: "A purchaser with notice can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can no more than the mortgagor assert that equity against the mortgage without paying the debt or showing that it has been paid or released, or circumstances sufficient to warrant the presumption of these facts." * * * "The vendee sits in the seat of his grantor, and is bound by his previous recognition of the mortgage as a subsisting incumbrance upon the premises."

In *Whitney* v. *French et al*, 25 Vt. 663, upon which the defendants' counsel relies, there was no payment of interest or principal within fifteen years, and it was held that there was a presumption of the payment of the mortgage, and conclusive, unless encountered by distinct proofs. In this case payments were made within fifteen years though some of them must have been made by the mortgagor after his conveyance to the defend-

ants. Their possession was not adverse to the mortgagee but was consistent with the rights of the latter.

3. Upon the facts reported the defendants are not entitled to betterments. It is found that when they took their deed from Tracy they knew that the petitioner held a mortgage on the farm, of which their mill-site was a part. They were not warranted in supposing that they acquired a good title to the land as against the petitioner's mortgage. They so supposed against their knowledge of the fact that the petitioner's title was superior to theirs. The right of a party to betterments depends upon his *bona fide* supposition that he bought the title in fee. *Whitney* v. *Richardson*, 31 Vt. 300.

Decree affirmed, and cause remanded.

SCHOOL DIST. NO. 4 IN BETHEL *v.* SCHOOL DIST. NO. 2 IN STOCKBRIDGE.

Instruction of scholars in other district. Vote of district authorizing same. Warning.

1. Under No. 9, s. 105, Acts of 1888, the prudential committee of one school district has no authority to contract with an adjoining district for the instruction of the scholars of the former unless authorized by a vote of his district in accordance with the provisions of that act.
2. If the prudential committee has no such authority his district is not liable for instruction furnished by an adjoining district under contract with him.
3. The district appointed an agent to settle all claims against it, having in contemplation this claim by the plaintiff for tuition. *Held*, that the district would not be bound by the action of the agent, unless there was some appropriate article in the warning for the meeting at which he was appointed.

School Dist. No. 4 in Bethel *v.* School Dist. No. 2. in Stockbridge.

4. An article, "to see if the district will vote to instruct the prudential committee to hire their scholars schooled in other districts," or "to see if they will raise money to defray the expenses of the same," is not sufficient.

Assumpsit. Trial by court at the December term, 1891, Taft, J., presiding. Judgment for the plaintiff' The defendant excepts. The opinion states the case.

J. J. Wilson, for the defendant.

The committee could not bind the defendant for the instruction of its scholars without the vote of the district. *Woodcock* v. *Bolster*, 35 Vt. 132; *Goodwin* v. *Perkins*, 39 Vt. 578; *Chittenden* v. *School Dist.*, 56 Vt. 551; No. 9 of the Acts of 1888, s. 105.

The appointment of an agent without a suitable warning would not make the district liable for his acts. No. 9, Acts 1888, s. 90; *Hunt* v. *School District*, 14 Vt. 300; *Shaw* v. *Bugbee*, 16 Vt. 439; *Greenbanks* v. *Boutwell*, 43 Vt. 207; *Blush* v. *Colchester*, 39 Vt. 193; *Atwood* v. *Lincoln*, 44 Vt. 332; *Allen* v. *Burlington*, 45 Vt. 202, *Harrington* v. *School District*, 30 Vt. 155; Angel and Ames Corp. s. 239; *Hayden* v. *Middlesex Turnpike Co.*, 10 Mass. 397.

Hunton & Stickney, for the plaintiff.

Without any vote of the district the prudential committee might provide at the expense of the district for schooling its pupils. *Chittenden* v. *School District in Waterbury*, 56 Vt. 551; *School District* v. *Harvey*, Ib. 556.

The plaintiff was not bound to inquire whether the necessary vote had been passed. *Baker* v. *School District in Barton*, 46 Vt. 189; *Manhattan Hardware Co.* v. *Roland*, 18 Atl. Rep. 428, pl. 2.

The defendant having received the benefit of the contract should perform on its part. *Lynch* v. *Flint*, 56 Vt. 46; *State Baptist Convention* v. *Ladd*, 58 Vt. 95, pl. 3; *Rowell* v. *School District in Tunbridge*, 59 Vt. 658.

The opinion of the court was delivered by

TYLER, J. To warrant the prudential committee of one school district in making a contract with an adjoining district for the instruction of the pupils of the former in the schools of the latter, all the essential requirements of section 105, No. 9, Laws of 1888, must have been complied with. That section is as follows:

"A district may, under an appropriate article in the warning, by a two-thirds vote, authorize its prudential committee to arrange for the instruction of all its legal pupils, in the studies prescribed by law, in the schools of an adjoining district or districts or in the most convenient schools of an adjoining town or towns in another State, and may authorize the transportation of such pupils to and from school."

The determination of the district not to support a school during a school year or term, but to arrange for the instruction of its pupils in other districts, is an important matter in the administration of its affairs; hence the strict precedent conditions to such action, that the attention of the voters of the district shall be called to the subject by an article in the warning for the meeting at which the vote is to be taken, and that the vote shall be passed by two-thirds of the voters present. In this case the committee made the contract with the plaintiff district without authority from the defendant.

But it is contended by the plaintiff's counsel that, though the committee had no express authority, he acted in pursuance of a statutory obligation and of his duty to the district to provide for the instruction of its pupils in the studies prescribed by law. This position cannot be maintained. It was held in *Chittenden* v. *School Dist. Waterbury*, 56 Vt. 551, cited by the plaintiff's counsel, that a prudential committee, acting in good faith to his district, could make a contract for the services of a teacher which contract extended somewhat beyond the committee's term of office and upon the term of his successor, but this was upon the ground that his power to make such a contract was derived from

the statute and not from the district. For the same reason it was held in *School Dist. Waterbury* v. *Harvey*, 56 Vt. 556, that the vote of the district instructing the committee to employ a female teacher was not obligatory upon him, but advisory only. These cases are not in point, for the act of 1888 expressly confers upon the district the power of deciding whether or not it will have its legal pupils instructed in other districts, and its prudential committee has no duty in that respect to perform beyond what is imposed upon him by the vote of the district. *Baker* v. *School Dist.* in *Barton*, 46 Vt. 189, is not an authority for the plaintiff. In that case the district voted to build a school house, fixed its location and appointed a committee to superintend its construction. The committee employed the plaintiff to build it, not where it had been located, but in another place upon the land of the district. It was held that, the committee having actual authority to make a contract, the plaintiff had a right to presume that they acted within the scope of their authority. In *Harrington* v. *School Dist. in Alburgh*, 30 Vt. 155, it was held that an attorney could not recover for his services in defending a suit against the district upon employment by the prudential committee who had no authority therefor from the district. See *Manhattan Hardware Co.* v. *Phalen*, 128 Pa. 110 (18 Atl. Rep.) 428.

It is further insisted that the plaintiff may recover by virtue of section 106, Act of 1888, which provides that a prudential committee may, for a reasonable compensation to be paid into the treasury of the district, admit to the school under his charge the pupils of an adjoining district by arrangement with the prudential committee of such district. If this position is maintainable section 105 of the act would be rendered nugatory, and any committee could at his pleasure bind his district without its authority.

At the adjourned meeting held April 29 the defendant elected Nathan Davis special collector to collect and settle all unsettled matters in the district. This collector and the plaintiff's

prudential committee agreed upon the sums which the plaintiff was entitled to receive for instructing the defendant's pupils, and the collector "made and spread upon the records a report showing credits to the district of cash and taxes due, and charging the district with an insurance tax paid, and with the sum of $28.50 as due for tuition of the Davis children, and $14 for tuition of the Fish children, and striking a balance."

The court below found, "that the only action taken by the defendant district in the matter was the appointment of said Davis as aforesaid," and held that the collector was authorized to collect and settle all unsettled matters as appears by the record, if the proceedings relative to the appointment of the collector were valid.

The statement which Davis spread upon the records shows no outstanding claims against the defendant except those of the plaintiff and the Gaysville district and a small insurance bill; therefore the vote authorizing Davis to settle all unsettled matters must have related to the demands for tuition. It was clearly the intention of the voters present at that meeting, as manifested by their vote, to direct their payment. It must be held that the demands were not legally enforceable against the defendant, inasmuch as the prudential committee made the contracts without authority. The case then turns upon the question whether any article in the warning for the annual meeting apprised the voters of the district that it would be proposed at any meeting that could be held under the warning to pay this demand of the plaintiff. The requirements of the statute relative to warnings for town and school district meetings are substantially the same: they must state the business to be transacted or considered. In *Ovitt* v. *Chase*, 37 Vt. 196, it was held that the subject for consideration should be indicated in the warning with reasonable certainty, and in such a manner that no person interested could be misled in respect to the proposition submitted for the consideration and action of the town. *Moore* v. *Beattie*, 33 Vt. 219; *Al-*

ger v. *Curry*, 40 Vt. 437. The warning for the annual meeting contained among others the following articles:

"8th. To see if the district will vote to have a school, if so how much."

"9th. To raise money to defray expenses of said school."

"10th. To see if the district will vote to instruct the prudential committee to hire their scholars schooled in other districts."

"11th. To see if they will raise money to defray expenses of the same."

It is true that article 10 and 11 related to the questions of having the pupils instructed in other districts and of raising money to pay for the same, but the plaintiff's demand for tuition was not embodied in these articles and could not have been, for the contract between the plaintiff and the defendant's committee had not been made when the warning was posted. Voters in the district, having in mind the articles in the warning and the fact that the committee was not authorized at the annual meeting to arrange for the instruction of the defendant's pupils in other districts, had no reason to anticipate that a proposition to pay the plaintiff's claim would come before the adjourned meeting. It must therefore be held that no article in the warning authorized the vote, and that the record evidence was incompetent and improperly admitted.

Judgment reversed and judgment for the defendant.

FRANK O. DAME & CO. *v.* JOHN W. FLINT.

Intoxicating liquor. Place of sale. Delivery to express company. Assignment of receipt carries title to property.

1. The seller of intoxicating liquor may recover the purchase price in Vermont if the sale and delivery were in Massachusetts.
2. Where intoxicating liquor is ordered by letter by a person in New Hampshire from a firm doing business in Boston, Mass., the sale is to be treated as made at the place where the goods are delivered.
3. Nothing appearing as to the terms of payment, a delivery to an express company for transportation by the direction of the purchaser, is a delivery to the purchaser at the place where such delivery is made.
4. Where the seller delivered the goods to the railroad company consigned to his own order at Windsor, Vt., and took duplicate receipts therefor from the company, which he immediately endorsed to bearer and deposited in the post-office addressed to the purchaser, who afterwards claimed and received the goods upon the same at Windsor, the depositing of the receipts in the post-office in Boston operated as a delivery of the goods there.

Book account for the purchase price of certain intoxicating liquor. Heard upon the report of an auditor at the December term, 1891, Taft, J., presiding. Judgment upon the report for the plaintiff. The defendant excepts. The facts appear in the opinion.

J. C. Enright and *J. J. Wilson*, for the defendant.

The sale was at Windsor. The duplicate receipt did not pass the title until the receipt of the goods. *State* v. *O'Neil*, 58 Vt. 140; *Dunn* v. *State*, 8 S. E. Rep. 806; *Well* v. *Golden*, 2 N. E. Rep. 235; *State* v. *Bowman*, 78 Iowa 519.

William Batchelder, for the plaintiff.

When the receipt was endorsed and deposited in the post-

office that passed the title to the goods. 1 Benj. Sales, ss. 571, 577; 2 Redf. Rys., 164, 165, note g, and cases cited; *Newcomb* v. *Railroad Co.*, 115 Mass. 230; *Bank* v. *Crocker*, 111 Mass. 163; Benj. Sales, ss. 44, 45, 46, 47, and cases cited, and s. 1044 note 26, and cases cited; *Tilden* v. *Minor*, 45 Vt. 196; *Davis et al* v. *Bradley & Co.*, 28 Vt., 118; *Dunn* v. *State*, 8 S. E. Rep. 806.

The opinion of the court was delivered by

THOMPSON, J. The plaintiffs resided in Boston, Mass., and were there engaged in the wholesale liquor business, and the defendant resided in Cornish, N. H., during the time covered by their liquor transactions with each other. All the intoxicating liquor furnished the defendant by the plaintiffs for which they seek to recover, was sent him in response to his orders, received by them at their place of business in Boston. The defendant received and accepted all the intoxicating liquor thus sent him. He now seeks to avoid payment of the balance due for the same on the ground that the sale and delivery of the liquor were in this State, and that consequently the plaintiffs are barred from recovering therefor by R. L. s. 3801.

If the sale and delivery were in Massachusetts, the plaintiff is entitled to recover. *Tuttle* v. *Holland*, 43 Vt. 542.

The first shipment of liquor was from Boston by express, addressed to the defendant at Windsor, Vt., pursuant to his order. The delivery of this liquor to the carrier for the defendant was a delivery to him in Boston. *Tuttle* v. *Holland, supra*; 1 Benj. on Sales (4th Am. Ed. with Corbin's notes) s. 517.

The remainder of the liquor was shipped by the plaintiffs by the Railroad Co. from Boston to Windsor, Vt., consigned to themselves. At each shipment the freight agent of the Railroad Co., at Boston, delivered to them duplicate receipts for the liquor so shipped. The plaintiff each time endorsed the duplicate receipt with the words, "Deliver to the bearer," and signed this

endorsement with their firm name of Frank O. Dame & Co., and immediately sent it from Boston, by mail, to the defendant, who duly received the same, and obtained the liquor shipped on presentation of such duplicate receipts to the freight agent at Windsor station, who kept them as his vouchers.

The endorsement of the receipts by the plaintiffs and the depositing of them in the post-office at Boston, addressed to the defendant, operated in law to pass the title, and as a delivery of the goods to him in Boston, at the time the receipts were thus deposited in the post-office. *Davis* v. *Bradley*, 28 Vt. 118; *Tilden* v. *Minor*, 45 Vt. 196; *Joslyn* v. *Grand Trunk Ry. Co.*, 51 Vt. 92; *Bank* v. *Crocker*, 111 Mass. 163; *Nat'l Bank* v. *Dearborn*, 115 Mass. 219; *Newcomb* v. *Railroad*, 115 Mass. 230; 2 Redfield on Rail. (4th Ed.) 164; 1 Benj. on Sales (4th Am. Ed. Corbin's notes) ss. 571, 577; 2 Benj. on Sales (same Ed.) s. 1044 and note 26; *Lickbarrow* v. *Mason*, 1 Smith's Lead. Cases. (6th Am. Ed.) note by Hare & Wallace, pp. 1082, 1095; *Buffington* v. *Curtis*, 15 Mass. 528; Story on Sales, (4th Ed.) ss. 311, 311a. It is clear that it was the intention of the parties that this should pass the title and operate as a delivery of the property.

Judgment affirmed.

ORANGE COUNTY.

MAY TERM, 1892.

PRESENT: ROWELL, TYLER, MUNSON AND START, JJ.

W. S. CURTIS *v.* WATSON AND VOODRY.

Defective allegation rejected as surplussage. Construction of agreement to convey.

1. A declaration otherwise good, is not rendered bad on demurrer by a defective allegation which may be rejected as surplussage.
2. *Held*, that the declaration sufficiently alleged that the defendants promised for themselves, and not for the corporation in which they were stockholders.
3. Also that upon the facts set forth the plaintiff was entitled to a conveyance to himself upon offer of the purchase price, and that it was immaterial whether he sold it to others.

Assumpsit. Heard upon demurrer to the declaration at the June term, 1891, Taft, J., presiding. Demurrer overruled. The defendants except.

The declaration was as follows:

"On the 7th day of January, A. D., 1890, at Hardwick in the county of Caledonia, the defendants represented to the plaintiff that they owned a majority of the stock in a certain corporation known as the Woodbury Granite Company, and were authorized by the other stockholders to enter into a contract for the sale of the property of said corporation to the plaintiff; and in consideration of the premises, and that the plaintiff would either buy said property himself or procure other persons to purchase the same, the said defendants then and there entered into a contract in writing with the plaintiff, in the words and figures following:

$30,000.

We, the undersigned, do hereby agree to sell and convey to W. S. Curtis or the bearer of this agreement, all lands and property, owned and operated by the Woodbury Granite Co., together with all orders for stock not filled and delivered at time of conveyance, for the sum of thirty thousand dollars, said property to be free from all incumbranee of any kind or description.

This option shall be binding upon said company for thirty days from date of this agreement.

CHARLES A. WATSON,
L. W. VOODRY.

Dated at Hardwick, Vt., Jan. 7, 1890.

And the plaintiff avers that in consideration of the agreement aforesaid of the defendants and relying upon the same and the representations aforesaid of the said defendants (he spent his time and a large sum of money in trying to induce other persons either to purchase the property named in said agreement for themselves or jointly with the plaintiff; and the plaintiff succeeded in so doing; and the plaintiff avers that within thirty days from the 7th day of January, A. D. 1890, to wit: On the 5th day of February, A. D. 1890, the plaintiff requested the defendants to convey to him or cause to be conveyed to him the property named in the aforesaid contract; and the plaintiff avers that within thirty days from the 7th day of January, A. D. 1890, on, to wit: The 5th day of Februry, A. D. 1890, the plaintiff was ready and willing and then and there offered to pay the defendants the sum of thirty thousand dollars for the same according to agreement.

And the defendants then and there refused to convey said property named in said agreement to the plaintiff."

Hunton & Stickney, for the defendants.

Upon the face of the contract it bound not the defendants but the corporation. *Proctor* v. *Webber*, 1 D. Chip. 371; *Roberts* v. *Button*, 14 Vt. 195.

The defendants disclosed their agency at the time of making the contract and are not personally liable. *Royce* v. *Allen*, 28 Vt. 234; *Baldwin* v. *Leonard*, 39 Vt. 260; *Hall* v. *Huntoon*, 17 Vt. 244; 2 Kent, 834-840.

S. C. Shurtleff, for the plaintiff.

No tender was necessary under the agreement. *Faulkner* v. *Hubard*, 26 Vt. 452.

W. S. Curtis *v.* Watson and Voodry.

The opinion of the court was delivered by

MUNSON, J. The agreement which the plaintiff sues upon is signed by the defendants, but is for the sale of the property of a corporation in which they were stockholders. The defendants insist that it appears from the declaration that in executing this agreement they were acting for the corporation and that this was known to the plaintiff.

The defendants could contract to convey at a future date property of which they were not then the owners. So the fact that the property to which the agreement related was the property of the corporation was not in itself notice that the defendants were acting as its agents. Nor can the statements which accompanied the execution of the writing be construed as a representation that it was signed in pursuance of authority given by the company. The corporation could be bound to the disposal of its entire property only by corporate action; and the statements that the defendants owned a majority of the stock, and were authorized by the other stockholders to enter into the contract, were no more than an assurance that the defendants would be able to procure the property which they contracted to convey.

The declaration is not defective for the want of an allegation that the defendants intended to bind themselves personally, or contracted on their own behalf. The contract itself is embodied in the declaration, and is to be construed by the court; and the declaration will show a cause of action against the defendants if it be held that the terms of the contract are such as to bind the signers personally.

The agreement is that the signers will sell and convey to the plaintiff or bearer the property owned by the company for a specified sum. The signers do not style themselves agents; nor do they represent themselves as acting for the corporation, otherwise than in saying that the option shall be binding upon the company for a given time. But this clause, even if treated as the controlling expression of the agreement, can be given no other

effect, when considered in connection with the accompanying representations, than that the defendants assumed to speak for the company without having, or claiming to have, any actual authority to do so. So, whatever effect may be given the clause, the case presented by the declaration discloses no reason why the plaintiff may not hold the signers of this agreement personally liable thereon.

The other grounds of demurrer relied upon in argument cannot avail the defendants. The plaintiff's right to a conveyance was not conditioned upon his effecting a sale of a part or all of the property to others, and no averment as to the interest of others in the conveyance was essential. The plaintiff was entitled to a conveyance to himself upon making the payment required by the agreement. His right of action is established by showing that the money was procured and offered, and a conveyance to himself demanded. The allegations concerning his efforts and success in securing others to purchase are immaterial, and separable from the other parts of the declaration, and so may be treated as surplusage. The defective allegation in a declaration of matter that may be rejected as surplusage is not demurrable. 1 Chit. Plead. 230.

Judgment affirmed and cause remanded.

Geo. J. Prince *et al v.* Town of Braintree.

GEO. J. PRINCE ET AL *v.* TOWN OF BRAINTREE.

Highways. Land damages. Private road already constructed. Revision of judgment in Supreme Court.

1. Where a public highway is laid out over a private road in such manner as to convert the private into a public thoroughfare, the land owner is not entitled to recover as damages the expense of constructing the private road, but simply such damages as is actually done him by the taking, notwithstanding that the public has the benefit of his labor.

2. Where commissioners appointed by the County Court upon the laying out of a highway, report certain facts, upon which the County Court gives judgment, the Supreme Court will revise the judgment in so far as it contains errors of law.

Petition to the County Court for the establishment of a highway. Heard upon the report of commissioners, and exceptions of the defendant thereto, at the June term, 1890, Rowell, J., presiding. The Court overruled the exceptions of the defendant to the report, established the highway in accordance with the report, and awarded Geo. J. Princes damages in the sum of $300. The defendant excepted to the judgment awarding damages to said Prince.

The report of the commissioners laid the highway substantially according to the prayer of the petition, and awarded land damages to the said Prince in the sum of $300, but awarded no other land damages. In reference to the damages of the said Prince the commissioners reported as follows:

"We award said three hundred dollars land damages to said George J. Prince, because we lay and establish said highway over and upon a good road built by said Prince, and not otherwise; meaning hereby that if we had found no wrought road where said highway is laid out and established we should award him no damages, but should consider that the benefit to said George J. Prince of a good highway built and supported by the

town through his said lands would be equal to his damages; and therefore in estimating said damages it was based upon the expense to said Prince of building said road or private way through his own premises, including the A. B. Cushman land.

We further find that said private way was mostly built by said Prince before the petition in this case was served on said town of Braintree, and we further find that said Prince has expended on said private way, in building the same, from six hundred to eight hundred dollars."

The defendant excepted to the report of the commissioners for that "The elements that the commissioners considered in making up and arriving at the damages are not proper subjects to award damages upon."

N. L. Boyden, for the defendant.

The expense of constructing the private road was not a proper element of damages. *Dalrymple* v. *Whitingham*, 26 Vt. 345.

J. D. Denison, for the petitioner.

The petitioner was entitled to the value of his land taken, and that value should be determined as of the date of the taking and not of some previous date. Constitution Vt. Art. 2, Chap 1.

The court in any event will not reverse this judgment, since it would not grant under the circumstances a writ of *certiorari*. R. L. s. 1387; *Chase* v. *Town of Rutland*, 47 Vt. 393.

The opinion of the court was delivered by

TYLER, J. If the benefits accruing to the town in consequence of taking the land of a private person for highway purposes furnished the rule of damages, the petitioner would be entitled to the $300 awarded him by the commissioners, inasmuch as the defendant town received the benefit of his expenses in building the road. But this is not the rule. When lands are so taken the owner is entitled to recover such damages as he has sustained. The hearings and awards by selectmen and commis-

sioners are in all cases upon the claims of the land owners for damages. R. L. 2925–2942.

The commissioners say in their amended report: "We award said $300 land damages to said Geo. J. Prince because we lay and establish said highway over and upon a good road built by said Prince, and not otherwise; meaning hereby that if we had found no wrought road where said highway is laid out and established we should award him no damages, but should consider that the benefit to him of a good highway built and supported by the town through his land would be equal to his damages; and therefore in estimating the damages they were based upon the expense to said Prince of building said road or private way through his own premises." They further state that this private way was mainly built before the petition was served upon the town and at an expense to the petitioner of between $600 and $800.

However equitable the petitioner's claim that he should be awarded a part of the expense paid by him and of which the town reaped the benefit, the statute furnishes no warrant for such an award. In *Dalrymple* v. *Whitingham*, 26 Vt. 345, the rule laid down in *Commonwealth* v. *Norfolk*, 5 Mass. 435, was recognized, that in ascertaining the damages for land taken for a highway, the only matters proper to be considered are the value of the land taken, the expense of fencing, and the damages done to the land remaining. In *Livermore* v. *Jamaica*, 23 Vt. 361, the statute was construed to provide a compensation commensurate with the injury sustained by the land owner, and it was held that in estimating such injury the benefit of the highway to him should be considered. The Court also said that the taking of land for this purpose did not divest the owner of the title; that it only gave the public an easement in the land, while the owner continued to have a right to such use of it as was consistent with the public enjoyment of the easement. In this case the commissioners state that if there had been no wrought road over the petitioner's land they should have considered that the bene-

fit of the public highway to him equalled his damages. Their award was to reimburse him in part for his expenses in building the road. The award was erroneous; it appears by the report that the petitioner sustained no greater injury in consequence of his private road being adopted as a highway than he would have sustained had there been no private road and the commissioners had laid a highway over the route.

The petitioner's counsel makes the further point that, as the hearing before the commissioners was in the nature of sessions proceedings, their findings upon the question of damages was a finding of fact and final; that this Court will not revise the judgment of the County Court upon the report of commissioners unless it would have granted a writ of *certiorari* for the same cause. Sec. 1387, R. L. provides that questions of law arising upon the trial of a petition to lay out, alter, or discontinue a highway, * * * * may pass to the Supreme Court for final decision, as in other cases; but no judgment of the County Court shall be revised which has been rendered in a proceeding mentioned in this section, unless the Supreme Court would have granted a writ of *certiorari* for the same cause.

Questions which rest in the discretion of the County Court, in highway cases, will not be revised on *certiorari*. If the question here were whether or not the public good required the establishing of this highway, or, if the question were as to the amount of the damages which the petitioner was entitled to receive—his legal right to some damages being made out—this Court would not exercise its revisory power; these questions would then have been exclusively within the jurisdiction of the commissioners and the County Court. *West River Bridge Co.* v. *Dix*, 16 Vt. 446; *Londonderry* v. *Peru*, 45 Vt. 424; *Gray* v. *Middletown*, 56 Vt. 53. Though the granting of the writ is in great measure discretionary with the Court, this discretion will only be exercised where the error is one that affects the substantial justice of the case. Rob. Dig. 127; *Sharon* v. *Strafford*,

56 Vt. 421; *French* v. *Barre*, 58 Vt. 567. In this case the error is one which affects the legal right of the defendant. It is a question of law upon the facts reported whether the petitioner is entitled to any damages, and not a matter of discretion with the court below. This error would have been revisable upon *certiorari*, and the point made by the petitioner is not sustained.

That part of the judgment which gives $300 damages to the petitioner is reversed with costs to the defendant in this court. The judgment in all other respects is affirmed.

EUNICE A. ADAMS *v.* GEORGE M. SLEEPER.

Setting wife's sole property to husband and wife does not avoid list. Failure of clerk to record warning not fatal. No. 131, Acts 1888. Construction of statutes. Warning.

1. The fact that the sole property of the wife is set in the list to herself and her husband jointly does not render the list void as against her.
2. In the construction of statutes the intention of the law-giver, when accurately ascertained, will prevail over the literal sense of terms.
3. The proceedings of a school district meeting are not void because the clerk failed to record the warning in accordance with No. 131, Acts of 1888.
4. Under a warning to see if the district will "vote to raise money to pay the district expenses," a vote to "raise money to support the school and pay the indebtedness of the district," is sufficiently definite.

Action of replevin for ten sheep and one colt. Plea, the general issue. Trial by jury at the June term, 1891, Taft, J., presiding. The court directed a verdict for the plaintiff. The defendant excepts.

It was conceded upon the trial that the plaintiff was the owner of the property replevied at the time it was taken by the

defendant. The defendant justified under a tax warrant, as a collector of taxes in school district No. 3, in the town of Washington. The warning for the meeting at which the taxes were voted, was not recorded until after the meeting was held.

The property upon which the taxes were levied was the sole property of the plaintiff, but the same was set in the grand list to the plaintiff and her husband.

The 3d and 4th articles in the warning, pursuant to which the school district meeting was held at which these taxes were voted were as follows: "3. To see if the district will vote to support a school in said district the coming school year. 4. To see if they will vote to raise money to pay the district expenses." The record of the meeting showed the following action upon these two articles in the warning: "3. To have 24 weeks school. 4. Voted to raise money to support the school and to pay the indebtedness of the district."

The court ruled that the property, being the sole property of the wife, was improperly set in the list to the plaintiff and her husband jointly: that the proceedings of the meeting at which the taxes were voted were void, for the reason that the warning was not recorded before the meeting; that the vote of the district raising this tax was not in accordance with the article in the warning, and, therefore, void, and that the list was irregular and void for each of these three reasons, and the warrant no justification to the defendant.

No. 131, Acts of 1888, was as follows:

"Section 1. All warnings for town, city, village, school and fire district meetings, and warnings for freeman's meetings, and for the election of presidential electors, shall, before the same are posted, be recorded by the clerks of such town, city, school or fire district, respectively."

Geo. L. Stowe and *R. M. Harvey*, for the defendant.

No. 131, Acts of 1888 is merely directory, and a neglect upon the part of a clerk to comply with it, does not vitiate the

proceedings of the meeting if otherwise regular. Sedgw. Stat. and Const. Law, 368; *People* v. *Allen*, 6 Wend. 487; *Torrey* v. *Millbury*, 21 Pick. 64; *Colt* v. *Eves*, 12 Conn. 253, 4, 5; *Soules* v. *Quinn*, 61 Vt. 354; *Willard* v. *Pike*, 53 Vt. 210.

The vote to raise money was sufficiently definite and within the warning. *Chandler* v. *Bradish*, 29 Vt. 420; *Adams* v. *Hyde*, 27 Vt. 223.

No actual or intentional wrong was done the plaintiff by setting her property in the list to herself and husband, and the list was not invalidated thereby. *Wilson* v. *Wheeler*, 55 Vt. 446; *Brock* v. *Bruce*, 58 Vt. 261.

J. K. Darling, for the plaintiff.

The meeting at which this tax was voted was not legal. No. 131, Acts of 1888; *Greenbanks* v. *Boutwell*, 43 Vt. 207.

The vote raising the tax was not pursuant to the article in the warning for that purpose. *Bowen* v. *King*, 34 Vt. 156; *Brown* v. *Hadley*, 12 Vt. 472; *Chandler* v. *Bradish*, 23 Vt. 416.

The opinion of the court was delivered by

TYLER, J. 1. The plaintiff claims that the tax was illegal because her personal property and real estate were set in the grand list to B. H. Adams and wife instead of to herself alone. This point does not seem to us well taken. It cannot be said that the property was not set to Mrs. Adams as the owner: the error was in joining her husband's name with hers, as if they were joint owners. Sec. 322, R. L. makes it the duty of the tax payer to procure a blank inventory and fill out and complete the same in all respects as required by law and to return it to the listers on or before April 20th. So far as the personal estate is concerned, it is fairly to be presumed that the listers placed it in the list as it was returned to them, for the legal presumption is in favor of the regularity of the proceedings of public officers. The same may not be true as to the real estate, for the listers could have ascer-

tained the state of the title from the records of deeds and from the list of transfers prepared by the town clerk under section 345.

It is not the policy of the law to invalidate a list on account of errors when the listers have acted in good faith and the errors prove harmless. It seems that upon the refusal of the plaintiff to pay the tax assessed upon the list of B. H. Adams and wife her property was taken by the collector of taxes upon the tax warrant, so that the error in inserting the names of both husband and wife in the grand list, as the owners of the property, worked no harm.

2. It is further claimed that the school meeting at which the tax was voted was illegal because the warning for the meeting was not recorded before it was posted, as required by No. 131, Laws of 1888. This question must depend upon whether this act is mandatory or merely directory. Statutes are held to be directory or declaratory, according to the existence or want of certain indications of legislative intent.

"When statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind the proceedings are held valid, though the command of the statute is disregarded or disobeyed. In these cases by a somewhat singular use of language, the statute is said to be directory. In other cases the statute is held to be imperative or mandatory." Sedg. on Stat. and Cons. Law, 368.

This statute imposes no penalty upon the clerks of school districts for non-compliance with its requirements. It does not declare that school meetings shall be illegal and their proceedings void if held without such a record of the warning. Then what was the real purpose of its enactment?

It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute, taken and compared to-

gether. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. The reason and intention of the lawgiver will control the strict letter of the law, when the letter would lead to palpable injustice, contradiction and absurdity. 1 Kent Com. 462. Are there any *indicia* from which the intent of the legislature in enacting this law can be gathered?

R. L. 521 requires that notices for school meetings shall specify the business to be transacted or questions to be considered at the meeting. The notice or warning is thus made by law the foundation for all the proceedings at the meeting held under it. *Sherwin* v. *Bugbee*, 17 Vt. 337. In the light of the importance of warnings for the different kinds of meetings named in the Act of 1888, the intent of the legislature is easily discoverable, which is that if the warning should be lost or destroyed the record of it might be produced and the meeting held under it. The purpose obviously was not to prevent meetings being held by towns, school districts and other municipal corporations named in the act, but to guard against a possible failure of such meetings through a loss of the warning therefor. It can hardly be conceived that the legislature intended that if a town meeting were held for the voters to exercise their right of suffrage in the choice of presidential electors, that the meeting must be declared illegal because the town clerk, through accident, ignorance or design, had omitted to record the warning. As was said by a learned jurist: "A strict and literal adherence to the letter and form of a statute in minor or non-essential particulars, will often defeat a remedy, or destroy a right which it was the principal intention of the legislature to create or provide."

3. Under articles 3 and 4 in the warning, "to see if the district will vote to support a school in said district the coming school year," and, "to see if they will vote to raise money to pay the district expenses," it was voted "to have 24 weeks of school" and, "to raise money to support the school and to pay the in-

debtedness of the district." On this point we quote the language of Redfield, Ch. J., in *Adams* v. *Hyde*, 27 Vt. 221, where the vote was, "that a tax should be raised to pay the expenses of the repairs of their school-house." "It is argued that the amount to be raised, or the rate *per cent* of the tax, should be limited in the vote. It is obvious that any such limitation could be but a conjecture, or approximation towards the truth. Really the most sensible and safe mode, must be, to do it in the mode here done. The only other mode would be to have a committee to examine and report the amount required, and to adjourn the meeting of the district to receive and ratify the report. But this, we think, may with propriety be left to the discretion of the committee, and that they may be authorized to assess a tax for the amount found necessary." *Bill* v. *Dow*, 56 Vt. 562. We think the vote clearly warranted the prudential committee in assessing the tax.

Judgment reversed and cause remanded.

S. W. CURTIS *v.* CHARLES A. WATSON.

Sale of property may include procuring conveyance of same.

The plaintiff's declaration alleged that the defendant, being a large stockholder in that company, promised in writing to pay him the sum of two thousand dollars provided he would "do work and sell for Woodbury Granite Co. the lands and property of same for the sum of thirty thousand dollars;" that he did sell the property for that price to one Viall, notify the defendant thereof and request him to cause said property to be conveyed to said Viall, but that the defendant thereupon notified the plaintiff that the said property would not be conveyed by the said Woodbury Granite Co., and that the defendant would not accept said sum of thirty thousand dollars for the same. *Held*, that no cause of action was disclosed, for that a "sale" included not only the finding of a purchaser, but the procuring of a conveyance from the company.

Special assumpsit. Heard at the June term, 1891, upon

demurrer to the declaration, Taft, J., presiding. Demurrer overruled and declaration adjudged sufficient. The defendant excepts.

The declaration was as follows:

"On the 7th day of January, A. D. 1890, at Hardwick, in the county of Caledonia, the def ndant in consideration that the plaintiff would work and sell for the Woodbury Granite Co. the lands and property of said company for the sum of thirty thousand dollars, the defendant then and there agreed to pay the plaintiff the sum of two thousand dollars within thirty days from the date of such sale, and the defendant then and there gave the plaintiff a writing with his hand witnessing such agreement and promise, which is in words and figures following:

'$2000.

I hereby agree to give W. S. Curtis of Randolph the sum of two thousand dollars, provided that said Curtis shall do work and sell for Woodbury Granite Co. the lands and property of the same for the sum of thirty thousand dollars cash in hand or approved paper, said amount to be paid said Curtis within thirty days from date of sale.

CHARLES A. WATSON.

Hardwick, Vt., Jan. 7, 1890.'

And the plaintiff avers that on said 7th day of January, 1890, the defendant represented to the plaintiff, that he was a large owner in the Woodbury Granite Co. and he desired to have the property of said company sold for the amount of thirty thousand dollars. Said property consisted of a large and valuable granite quarry and the defendant employed the plaintiff to work and sell the same according to the terms of the writing aforesaid.

And the plaintiff avers that he did work and sell for the Woodbury Granite Company the lands and property of the same referred to in said written agreement for the sum of thirty thousand dollars, cash in hand, to W. B. Viall and others, and afterwards on to wit: the 5th day of February, A. D. 1890, at Woodbury, in the county of Washington, he notified the defendant of the sale aforesaid, and then and there requested the defendant to cause the property of said Woodbury Granite Company to be conveyed to the said W. B. Viall; and the plaintiff further avers that the said W. B. Viall on, to wit: the 5th day of February, A. D. 1890, at Woodbury aforesaid, was ready and willing and then and there offered to pay the defendant the sum of thirty

thousand dollars cash in hand for the property aforesaid, if the defendant would receive the same; and both the plaintiff and the said W. B. Viall then and there requested the defendant to cause a conveyance of the property aforesaid of the Woodbury Granite Company to be made to the said W. B. Viall, and the plaintiff avers that the defendant then and there notified the plaintiff that the property aforesaid would not be conveyed by said Woodbury Granite Company as requested, and that the defendant would not accept or receive said sum of thirty thousand dollars for the same.

And the plaintiff avers that thirty days having long since elapsed since the plaintiff sold the property aforesaid, and gave the defendant notice thereof; yet the defendant has never paid said sum of two thousand dollars, nor any part thereof, but neglects and refuses to do so."

Hunton & Stickney, for the defendant.

The plaintiff had not perfected a sale of the property until he caused a conveyance thereof to be made. 2 Kent's Com. 468.

The fact that the condition precedent was a difficult or even an impossible one does not entitle the plaintiff to his money until he has performed it. 1 Chit. Pl., (6th Am. Ed.) 354; *Doughty* v. *Neal*, 1 Saund. 215; *Morsely* v. *Wood et al*, per Lord Kenyon, Ch. J.. 6 T. R. 710, 719.

S. C. Shurtleff, for the plaintiff.

The opinion of the court was delivered by

START, J. This cause was heard on the defendant's demurrer to the plaintiff's declaration. The declaration alleges that, on the 7th day of January, 1890, the defendant executed and delivered to the plaintiff a certain writing, as follows: "I hereby agree to give W. S. Curtis, of Randolph, the sum of two thousand dollars, provided that said Curtis shall do work and sell for Woodbury Granite Co. the lands and property of the same, for the sum of thirty thousand dollars cash in hand or approved paper, said amount to be paid said Curtis within thirty days from date of sale;" that the defendant was a large owner in the Wood-

bury Granite Company; that the plaintiff did work for the Woodbury Granite Company and sold its land and property to W. B. Viall and others for thirty thousand dollars; that the plaintiff notified the defendant of the sale and requested him to cause the property to be conveyed to said Viall; and that the defendant notified the plaintiff that the property would not be conveyed by the company.

While the plaintiff alleges in his declaration that he did sell for the Woodbury Granite Company its property, it appears from other allegations therein that he only found a party willing to purchase at the price named in the contract, and gave the defendant notice that he had a purchaser ready to take it and requested him to cause it to be conveyed. The plaintiff claims that this was a sale within the meaning of the contract, and that he is entitled to the two thousand dollars provided for therein. We think this was not such a performance of the contract by the plaintiff as entitles him to recover.

The contract provides that payment shall be made within thirty days from the date of the sale. This clearly means within thirty days after a sale of the property was perfected. It does not mean that payment was to be made within thirty days after the plaintiff found a party willing to purchase. The finding of a purchaser and notifying the defendant to cause the property to be conveyed, was not a performance of the contract on the part of the plaintiff. What the plaintiff did was of no benefit to the defendant. The defendant did not agree to pay the plaintiff for finding a purchaser, or for services that might or might not result in effecting a sale of the property. He agreed to pay two thousand dollars within thirty days after a sale of the property. The plaintiff was not selling the defendant's property. The property to be sold was owned by the Woodbury Granite Company, and it was just as essential that the plaintiff procure its assent to a sale as to find a purchaser. A part of the property was real estate, and a sale of it could not be effected without a conveyance from the com-

pany. It was the duty of the plaintiff to procure this conveyance if he would avail himself of the defendant's offer. Whatever was necessary to be done to perfect a sale was to be done by the plaintiff. The defendant did not undertake to do anything in respect thereto. His undertaking was to pay for a perfected sale. He did not undertake to pay and also do a part of the work necessary to be done in order to effect a sale. The plaintiff had no right to call upon the defendant to procure a conveyance from the company. No such duty is imposed upon him by the contract, and it does not appear from the declaration that his interest in the company was such that he could control a sale of its property, nor does it appear that he had authority to convey for the company; and the allegation in the declaration, that the plaintiff requested the defendant to *cause* the property of the company to be conveyed, would indicate that the defendant did not have such authority, and that the plaintiff so understood it.

The plaintiff was bound to procure a perfected sale of the lands and other property of the Woodbury Granite Company before he could rightfully claim the sum provided for in the defendant's offer. This he has not done. To perfect a sale of the lands owned by the Woodbury Granite Company implies a conveyance from the company, and the procuring of such a conveyance was as fully a part of the work to be performed by the plaintiff as if it had been particularly specified in the writing signed by the defendant. *Currier* v. *Boston and Maine Railroad*, 34 N. H. 498; *Wiggin* v. *Scammon*, 27 N. H. 360.

This is not a case of failure of one party to a contract to perform his part of the contract by reason of the wrongful acts or omission of the other party. The declaration contains no allegation that would justify the court in holding that the defendant took upon himself so important a part of the work of effecting a sale as procuring a conveyance from the company, or that he

has in any way hindered or prevented the plaintiff from perfecting a sale of the property.

Judgment reversed; demurrer sustained; declaration adjudged insufficient; and cause remanded.

GEORGE A. AMES & CO. *v.* GARDNER S. MELENDY.

Bailment. Special contract. Negligence need not be shown.

1. The owner of a saw mill may by special contract define the conditions under which he will receive and keep logs delivered at his mill for the purpose of being sawed.
2. If he absolutely agrees to be liable for the safe keeping of such logs, the owner, in case of loss, need not show negligence.

General assumpsit. Heard at the June term, 1891, Taft, J., presiding, upon the plaintiff's demurrer to the second and third pleas of the defendent. Demurrer overruled and cause passed to Supreme Court before final judgment upon plaintiff's exceptions to this ruling.

The plaintiff's second and third pleas were both pleas in offset. The second plea alleged in substance that the plaintiff was the owner of a saw mill situated upon the banks of the Connecticut river at which he did custom sawing; that the defendant owned a quantity of logs also upon the bank of the river above the plaintiff's mill, which he desired to have sawed; that it was agreed between the parties that the defendant should roll his logs into the river and notify the plaintiff, who should thereupon stretch a boom across the river and stop and keep the defendant's logs until they were sawed; that the defendant did roll his logs into the river, and did notify the plaintiff, but that the plaintiff's boom broke whereby the logs were lost.

The third plea was like the first save that it alleges that the

defendant delivered the logs to the plaintiff where they were rolled into the river. In neither plea was there any allegation of negligence in making or maintaining the boom.

Smith & Sloane, for the plaintiffs.

Under the allegations in the second and third pleas there was a bailment in which each party was obliged to use only ordinary care. *Carpenter* v. *Branch*, 13 Vt. 161; *Brown* v. *Hitchcock*, 28 Vt. 452; *Coggs* v. *Bernard*, 1 Smith's Lea. Cas. 82 and notes.

In such a bailment negligence must be alleged and proved. *Lamb* v. *Western Rd.*, 7 Allen 98; *Roberts* v. *Guerney*, 120 Mass. 33; *Melindy* v. *Ames & Co.*, 62 Vt. 14.

John H. Watson, for the defendant.

The parties might by special contract define the terms of this bailment. Having done so they are bound by the terms of that contract. Chit. Cont. 498 (10 Am. Ed.); *Wells* v. *The Steam Navigation Co.*, 2 N. Y. 204; *Dale* v. *See*, 14 Am. St. Rep. 688; *Harmony* v. *Bigham*, 12 N. Y. 99.

The opinion of the court was delivered by

ROWELL, J. That bailees of the character the plaintiffs were, may, by special contract, enlarge or restrict the obligation that the law would otherwise impose upon them by reason of the bailment, is beyond question. *Wells* v. *Steam Navigation Co.*, 2 N. Y. 204; *Dale* v. *See*, 51 N. J. Law, 378-14 Am. St. Rep. 688.

It is evident in this case that the pleader did not intend to declare upon the undertaking that the law would imply from the bailment, else he would have alleged negligence, with a *per quod*. But he declares upon a different undertaking, which must be taken for present purposes as a special undertaking; and it is one that could have been broken by the plaintiffs without negligence on their part, as it is declared upon as absolute and un-

conditional, and therefore the allegation of negligence is not essential to the assignment of a good breach of it.

If it should turn out on trial that the parties did not enter into the special contract declared upon, but only into such a contract as the law implied, the plaintiff's rights can then be fully protected.

Judgment affirmed and cause remanded.

WASHINGTON COUNTY,

MAY TERM, 1892.

PRESENT: TAFT, ROWELL, TYLER AND MUNSON, JJ.

LAURA A. CASWELL *v.* JAMES SHERMAN CASWELL.

Divorce not granted for cause existing at time of marriage. Imprisonment.

1. A divorce will not be granted for a cause which the libellant knew or ought to have known existed at the time of the marriage.
2. The libellant having married the libellee after he had been convicted of murder in the second degree, but while his case was pending in the Supreme Court on exceptions, a divorce will not be given upon the ground of his subsequent sentence to the State prison for life.

Petition for divorce. Heard at the September term, 1891, Start, J., presiding. Petition denied. The petitioner excepts.

The petitionee had been for many years the hired man of the petitioner's father, and as such a member of his family. The petitioner had lived in the same family, and although not married to the petitionee had stood to him in the relation of wife. Subsequently to the death of her father she married one Gould whom the petitionee shot and killed the day after the marriage. For this act he was arrested, tried and convicted of murder in the second degree. After the conviction and while the case was pending on exceptions in Supreme Court, the petitioner married the petitionee in jail. Subsequently the petitionee was sentenced

to the State prison for life, and this was the cause alleged in the petition.

S. C. Shurtleff, for the petitionee.

The statute is mandatory and the court has no discretion. *Miners* v. *The Mechanic's Bank of Alexandria*, 1 Pet. 46; *Supervisors* v. *U. S.*, 4 Wall. 435.

The opinion of the court was delivered by

TAFT, J. To entitle one to relief in a divorce court, the party must come with clean hands. It is a general doctrine that a man shall not complain of what he knew, or, might have known at the time of the marriage. At the time of the marriage the libellant knew, or had good reason to believe, that the libellee would be sentenced to life imprisonment in the State prison under a prior conviction of murder. When one marries a State prison convict it is trifling with the law, for the party to say, she did not know that sentence would follow conviction. A slight delay would have given the knowledge.

The decree is affirmed.

LAMOILLE COUNTY,

AUGUST TERM, 1892.

PRESENT: ROWELL, TYLER AND MUNSON, JJ.

HARRIET WILLEY *v.* FRANK LARAWAY.

Exceptions to report not necessary where question is submitted by referee. Tenant in dower may maintain action for injury to reversion. But not against the grantee of the reversioner.

1. Where the report of a referee submits to the court a question of law upon the facts found, no exception to the report is needed to raise that question.

2. A tenant in dower is liable to the reversioner for waste done the premises by a stranger, and may therefore maintain an action against a stranger for an injury to the reversion.

3. A judgment in such an action would bar an action for the same injury by the reversioner, for the tenant and reversioner are privies in estate.

4. The plaintiff was the widow of Silas Willey. Volney Willey, the heir of Silas Willey, conveyed to the defendant the east half of lot 31, "except five acres more or less out of the south-east corner of said lot heretofore set off as a part of the widow's dower." In fact more than fourteen acres of said lot had been set out as dower. The report found that the defendant had cut a small quantity of timber on the five acres excepted in the deed, and a much larger quantity on the nine acres not excepted, and that there was still ample timber for the estovers of the widow. *Held*, that the defendant was liable to the plaintiff for the timber cut upon the five acres, but not for that cut upon the nine acres, for as to that he was himself the reversioner, and the only injury was to the reversion.

Trespass for cutting and carrying away the trees of the plaintiff. Heard upon the report of referees at the April term,

1892, Ross, Ch. J., presiding. Judgment on the report for the larger sum. The defendant excepts.

The case appears in the opinion.

B. A. Hunt, for the defendant.

The plaintiff cannot recover for an injury to the reversion. 2 Wat. Tres., 398, ss. 950, 953; *Wood* v. *Griffin*, 46 N. H. 230.

The judgment would not be a bar to an action by the reversioner. 2 Wat. Tres., s. 951; 4 Kent, 78; Dicey Parties, 340, 329 to 343, marginal paging; 1 Addison Torts, s. 369.

P. K. Gleed, for the plaintiff.

The opinion of the court was delivered by

TYLER, J. The referee submitted the question of the plaintiff's right to recover to the determination of the court below, therefore exceptions to the report by the defendant were unnecessary. *White et al.* v. *White, Ex'r.*, 21 Vt. 250.

The first question to be determined is whether the plaintiff, holding a dower estate in the lands in question, can maintain this action for an injury to the reversion. The writ and declaration have not been furnished us, but counsel in argument have treated the action as brought upon sec. 4206, R. L., to recover treble damages. The action therefore is trespass *qu. cl. fr.* The statute giving treble damages in certain cases of trespass on real estate does not create the right of action, but only gives cumulative damages for what was, and still is, actionable at common law. *Montgomery* v. *Edwards*, 45 Vt. 75.

The right of a life tenant to cut wood and timber upon the lands in which his tenancy exists is limited to reasonable *estovers*. Our statute in respect of the liabilities of a dowress is only declaratory of the common law:

"No woman, endowed of lands, tenements, or hereditaments, shall commit or suffer waste on the same, but shall maintain the houses and tenements, with the fences and appurtenances, of which she is endowed, in good repair during her term, and leave

the same in good repair at the expiration thereof, and shall be liable to the person owning the reversion for damages occasioned by waste committed or suffered by her." R. L. 2227.

Voluntary waste implies acts of commission; permissive waste, acts of omission, as suffering buildings to fall for want of ordinary repairs, or lands to deteriorate from neglect. *2 Black. Com.* 281. It is not presumable that the legislature intended by the use of the word "suffer" to render the dowress liable for acts amounting to waste committed without her permission by third persons. A stranger who does injury to the premises is liable either to the tenant or the reversioner, but one who acts by the authority or permission of the tenant in possession is not a stranger, and for his acts the tenant would be liable as for commissive waste. *Livingston* v. *Mott*, 2 Wend. 605. Resort must therefore be had to the common law for remedies for wrongs of this character when committed by strangers to the title.

At common law tenants by the courtesy and in dower were answerable for waste committed by strangers, and this liability was by statutes 52 Hen. 111, c. 23, and 6 Edw. 1, c. 5, extended to tenants for life and for years. It is a general principle that the tenant, without some special agreement to the contrary, is responsible to the reversioner for all injuries amounting to waste, done to the premises during his term, by whomsoever the injuries may have been committed, with the exception of the acts of God, and public enemies, and of the reversioner himself. This principle is founded in public policy. The landlord cannot protect the property against strangers: the tenant is on the spot and presumed to be able to protect it. 4 *Kent's Com.* 77 1 *Wash. Real Prop.* 146, 156. Blackstone says, 2 *Com.* 283, that the law ought to protect the reversion when the tenant takes the estate by operation of law; while in other tenancies the lessor might have guarded in his lease against waste by the lessee. It was held in Massachusetts that a tenant for life is bound to see that trespassers do not injure the estate, and that for this purpose

the law gives him an action of trespass; so that whether waste is committed by himself or by a stranger, he is alike answerable to the reversioner. *Fay* v. *Brewer*, 3 Pick. 203; *Shattuck* v. *Shattuck*, 5 Pick. 191; *Clark* v. *Holden*, 7 Gray 8, 66 Am. Dec. 450. Beardsley, J., discussed this subject in *Cook* v. *The Champlain Transportation Co.*, 1 Denio 91, and quoted from the opinion of Heath, J., in *Attersoll* v. *Stevens*, 1 Taunt. 198, as follows: "It is common learning that every lessee of land, whether for life or for years, is liable in an action of waste to his lessor, for all waste done on the land in lease, by whomsoever it may be committed;" and from Chambre, J., in the same case: "The situation of the tenant is extremely analagous to that of a common carrier, to prevent collusion, * * * both are charged with the protection of the property entrusted to them against all but the acts of God and the king's enemies; and as the tenant in the one case is charged with the actual commission of the waste done by others, so in the other case the carrier is charged * * * though he loses the goods by a force that was irresistible," etc. He also quotes Lord Coke as saying: "Tenants by the courtesy, tenants in dower, tenants for life, years, etc. shall answer for the waste done by a stranger, and shall take their remedy over," and cites 1 Inst. 54, 57, 377 and notes; 1 Chit. Gen. Pr. 388; 2 Roll. Abr. 821; 3 Black. Com. 228; Comyn's Land. and Ten. 188.

Although the reversioner doubtless may bring his action against the actual trespasser, when the injuries affect the inheritance, it seems clear that the tenant in dower is answerable for such injuries to the estate; and being thus liable, it follows as a legal consequence that she has her action over against the trespasser. 4 Kent. 77; 1 Wash. Real. Prop. 156. The fact that the reversioner may omit to take action against the real trespasser, relying on the liability of the tenant to answer to him for such trespasses, is of itself a strong reason for holding that it is the right of the tenant to maintain an action against the wrong doer before judgment against herself in favor of the reversioner.

The counsel for the defendant urges that this judgment would not be a bar to an action by the reversioner against the defendant. It is true that a judgment is not conclusive except as to the parties thereto and their privies. *Nason* v. *Blaisdell*, 12 Vt. 165; *Gerrish* v. *Bragg*, 55 Vt. 329. On the other hand the judgment of a court of competent jurisdiction is conclusive between parties and privies. In this case there is a privity of estate between the reversioner and the tenant in dower so that this judgment would be a bar to another action. 1 Green. Ev. 189, 523; *Foot et al.* v. *Dickinson*, 2 Met. 611.

There is no ground for the argument that only five acres were set out to the widow from lot No. 31 as part of her dower. The commissioners, in Dec. 1878, set out that part of her dower by defined boundaries. In Dec. 1887, when the defendant took his deed, he and his grantor understood that only five acres of the dower estate were situated in that lot, and the deed was made upon that theory. A year or two later a question arose as to the north line of the dower and a survey was made whereby it was found that the dower land situated in lot No. 31 contained 14.36256 acres, as appears by the surveyor's map which is made part of the report.

Volney Willey, through his guardian, conveyed to the defendant a part of the Silas Willey farm, being "the east half of lot No. 31 except five acres more or less out of the south-east corner of said lot heretofore set off as a part of the widow's dower." An exception of 14.36256 acres, instead of five acres, should have been made from this conveyance.

The referee has found that the defendant cut timber of the value of $10 upon the five acres and of the value of $146.25 upon the 9.36256 acres, and that a sufficient amount remains for the requirements of the dower estate.

Another question now arises. It appears that the plaintiff is the widow of Silas Willey; that Volney Willey, an insane person, was an heir of Silas and had a reversionary interest in the

dower estate. It does not affirmatively appear by the report that there are other reversioners. Through a misunderstanding as to the number of acres that had been set out to the plaintiff in lot No. 31, the defendant by his deed acquired the reversioner's interest in 9.36256 acres, though he supposed he acquired an absolute title. He has cut timber upon all the land that was set out as dower in lot No. 31.

The defendant was not a stranger to that part of the dower, the reversion of which was conveyed to him by Volney Willey. To that he held the same relation which his grantor held before the conveyance. The injury to it was an injury to his own reversion, and a citation of authorities is not necessary to show that a reversioner is not liable for his own injuries to the estate except so far as they affect the rights of the tenant. In this case it appears that there was ample timber remaining for the plaintiff's *estovers* so that her rights as tenant in possession were not affected. If she should recover damages for injuries to the reversion the recovery would not be for herself but she would be answerable over to the defendant who owns the reversion.

If the fact were found, which is intimated in the brief of the defendant's counsel, that the defendant had a co-tenant in the reversion, it could not change the result. Tenants in common in a reversion have a present vested estate, and may hold each other liable for injuries to it, but from the nature of their seisin the tenant in dower is not liable to one for the acts of the other, and consequently she has no right of action against either.

As to that part of the dower which the defendant's grantor excepted from the conveyance the defendant was a stranger. The exception was "five acres, more or less," * * * the grantor evidently supposing that the dower consisted of only five acres. Although the reversioner would not have been liable had he committed injuries upon the excepted part, the defendant is liable

because it was excepted from the terms of the deed and he acquired no title to it.

The general rule, that a statement in a deed of the number of acres conveyed, with the words "more or less" added, is mere matter of description, does not apply here, for the exception is not in gross; the land excepted is not described by metes and bounds nor by courses and distances; it is described as a definite quantity, five acres, and the words, "more or less," cannot be construed to enlarge that quantity. *Smith* v. *Rock*, 59 Vt. 232. Besides, the referee finds that the defendant supposed that the dower consisted of five acres, and "that it had always been so considered." Both parties evidently understood that five acres were excepted. As the recovery is for the benefit of the reversioner a construction of the exception of the deed to mean fourteen and a fraction acres would permit a recovery for all the injuries done thereon and would in effect allow the reversioner to profit by his error.

Judgment reversed and judgment for the plaintiff for the smaller sum named in the report.

BRONSON WILLEY *v.* FRANK LARAWAY.

Tender under R. L. s. 1450. Officer's fees. Time of tender. Good faith of defendant.

1. An officer's return upon a copy of a writ is a part of such copy, and he may charge for the same by the folio.
2. An officer may take possession of personal property which he has previously attached by copy, if necessary, and in that case may charge a reasonable sum for so doing.
3. The plaintiff is under no obligation to furnish the defendant with a statement of his costs, and that he neglects or refuses to do so is no excuse for an insufficient tender.
4. In determining whether a tender has been reasonably made under R. L. s. 1450, both the day of the tender and the first day of the term should be excluded.
5. In case of a tender for damages by a trespass, the defendant will not be relieved from further costs unless the County Court affirmatively finds that he acted in good faith. It is not enough that no fact appears in the referee's report inconsistent with that idea.

This was an appeal from a taxation of costs by the clerk. Heard at the April term, 1892, Ross, Ch. J., presiding. The defendant excepts.

The question was as to the sufficiency of the tender. The original action was trespass for the cutting of timber. The case was referred, and the referees found the fact of the trespass and that the plaintiff's damages were $25. The suit was returnable to the April term, 1890, and it appeared that the Saturday before the return day the defendant tendered the plaintiff $32. Before making the tender the defendant applied to the plaintiff's attorney for a statement of his costs, which was not furnished, and the defendant estimated the costs as best he could.

The officer furnished two copies in making his service. Each of these copies contained 452 words in the body and 390

words in the return. The court allowed the two at $1.68. The original attachment was by copy in the town clerk's office. Afterwards the officer took possession of a part of the property, for securing which he charged $1. The court found that this was a reasonable sum. As so allowed, the damages and costs exceeded the amount of the tender by 13 cents; and the court held the tender insufficient and gave judgment for full costs.

B. A. Hunt, for the defendant.

P. K. Gleed, for the plaintiff.

The County Court did not adjudge that the trespass was committed in good faith. R. L. s. 1450; *Strusguth* v. *Pollard*, 62 Vt. 157.

The opinion of the court was delivered by

MUNSON, J. As the plaintiff's costs were taxed and allowed in the court below, his damages and costs exceeded the sum tendered thereon by the defendant. The defendant insists, however, that illegal fees, to an amount greater than this excess, were included in the allowance. But we think both the items objected to by the defendant were properly taxed. The copy required of an officer in serving process is a copy of the writ and his return, and he is entitled to compensation for the folios of the entire copy. The provision allowing a reasonable sum for securing attached property is not inapplicable where the attachment is by lodging a copy in the town clerk's office. Property so attached is held to be in the custody of the officer; and he is liable for a failure to produce it, unless he can excuse himself by showing that he exercised the same degree of care regarding it that is required in the case of property taken into actual possession. *Smith* v. *Church*, 27 Vt. 168; *McKOrmsby* v. *Morris*, 29 Vt. 417; *Fay* v. *Munson*, 40 Vt. 468. In the exercise of this care, it often becomes necessary for the officer to take measures for securing the property after lodging the copy. It is evident that the necessity existed in this case, for it appears that the

officer found that certain portions of the attached property were being disposed of.

The plaintiff's failure to state the amount of the accrued cost on request cannot relieve the defendant from the consequences of this deficiency in the amount tendered. The plaintiff was under no obligation to provide a taxation or state the amount. The case did not involve any costs that were peculiarly within his knowledge. See *Smith* v. *Wilbur*, 35 Vt. 132. The fees which the defendant sought to cover are either fixed by statute, or determined by the officer under legal restrictions; and the amount can ordinarily be readily ascertained by either party. It does not appear from the report of the clerk that the defendant was prevented from obtaining information from either the officer or the writ, by any act of the plaintiff or his counsel.

But if the tender had been sufficient in amount, it would have been ineffectual because not made within the time allowed by statute. A tender may be made at any time "until three days before the commencement of the term" to which the action is returnable. R. L. 1450. This language seems plainly to indicate an intention to exclude from the period in which the tender may be made the three days next preceding the day on which the term commences. So neither the day on which the tender is made, nor the first day of the term, can be counted as one of the three.

But if this tender were held sufficient, it would not relieve the defendant from the burden of further costs, in the absence of a finding by the County Court that he acted in good faith in the matter complained of. The rendering of judgment upon a report which contains findings inconsistent with the existence of bad faith, but which presents no question thereon for the consideration of the court, is not such action on the part of the Court as the statute requires. The "opinion of the court" must be taken upon the question of good faith.

Judgment affirmed.

STATE *v.* CHARLES WHEELER.

Complaint cannot be amended like information.

1. The complaint of a grand juror cannot be amended in matter of substance in the Appellate Court.
2. A complaint alleging that the respondent "became and was" intoxicated is defective in matter of substance and cannot be amended in the County Court so as to read "was found" intoxicated.

This was a complaint of a town grand juror and came by appeal from the judgment of a justice into the County Court, where it was heard at the December term, 1891, Thompson, J., presiding. The complaint alleged:

"That Charles Wheeler, of Hyde Park, in the County of Lamoille, and State of Vermont, on the 7th day of August, A. D. 1891, at Morristown, in said County of Lamoille, did with force and arms become and was intoxicated, by drinking intoxicating liquor, contrary to the form and effect of the statute, in such cases made and provided, and against the peace and dignity of the State."

The State moved to amend the complaint by inserting the word "found" so that it would read "became and was found" intoxicated, and the amendment was allowed. To this action of the court the respondent excepted, and the exceptions were passed to Supreme Court before trial.

P. K. Gleed, for the respondent.

The court had no power to allow the amendment. *State* v. *Stokes*, 54 Vt. 179.

J. W. Page, Jr., State's Attorney, for the State.

The opinion of the court was delivered by

ROWELL, J. That the amendment was matter of substance is shown by *State* v. *Austin*, 62 Vt. 291. It was not,

therefore, authorized by R. L. 3857, for that does not authorize amendments as to matters of substance. Nor was it authorized by sec. 2, No. 86 of the Acts of 1882, for conviction could not be had without the amendment, hence it was "material to the merits of the case," and the respondent would be "prejudiced thereby in his defence." We must look, then, to the common law for warrant to allow it, and it is not allowable there unless within the rule laid down in *State* v. *White*, *ante* 372, in respect of amending informations. But there is a material difference. In the case of informations, the informing officer is in court in person, prosecuting the case, and can, therefore, himself amend, with leave. But this complaint is made under the official oath of a grand juror, and he is not prosecuting in the Appellate Court, but the State's Attorney has control of the case there, and therefore the complaint cannot be amended there in matters of substance, for the same reason that an indictment cannot be thus amended, as it is found on the oath of a grand jury, and therefore ought to be amended only by the grand jury, which cannot be done, as they are not in court for such a purpose.

The argument that the insertion of the names of the witnesses in the body of the complaint is equivalent to an allegation that the respondent was found intoxicated, is not tenable, for it is obvious that the insertion was not intended as a part of the pleading, but only as a compliance with the statute requiring a memorandum of the names of the witnesses in support of the prosecution to be subjoined to the complaint.

Exceptions sustained, amendment disallowed, and cause remanded.

WINDHAM COUNTY.

FEBRUARY TERM, 1892.

PRESENT: ROSS, Ch. J., TYLER, MUNSON AND THOMPSON, J. J.

CONN. RIVER SAVINGS BANK *v.* CHARLES P. ALBEE AND HENRY C. LANE, ADMR. OF ESTATE OF SAMUEL ALBEE.

Voluntary trust. Deposit in bank to credit of another. Declarations.

1. The owner of property may create in himself a voluntary trust in respect thereto by any act or declaration which unequivocally shows that he holds such property in trust for the beneficiary.
2. It is not necessary that the beneficiary should know of or assent to such trust.
3. When a voluntary trust has once been perfected it cannot be revoked or altered by the donor, unless this right was reserved by the terms of its creation.
4. A father deposited in a savings bank a sum of money to the credit of his son, and received a deposit book in which the son was named as the depositor and he himself as trustee. The son did not know of the deposit and the father kept the book among his papers until his death. *Held*, that a voluntary trust was thereby created in favor of the son, unless some fact or declaration appeared to show a contrary intent.
5. That the father made the deposit in the name of the son to escape taxation is not such a fact.
6. Declarations of the father made after the deposit that the money was still his are inadmissible.

7. But his declarations that the deposit was for the benefit of his son are.

Bill of interpleader. Heard upon the pleadings and master's report at the September term, 1891. Rowell, chancellor, decreed that the orator be dismissed with its costs upon payment of the fund into court; that the fund belonged to the defendant, Charles P. Albee, and that he recover his costs of the defendant, Henry C. Lane. The defendant Lane appeals.

The orator is a savings bank located in Charlestown in the State of New Hampshire. In 1878 Samuel Albee, residing in Rockingham in the State of Vermont, had on deposit in said savings bank, something more than $3,000. On the 6th day of December of that year the treasurer of the bank wrote Mr. Albee to the effect that under the law as it then stood, all deposits of more than $2,000 in amount would be taxed against the depositor, and suggested that he might escape the payment of that tax by transferring a portion of the deposit, which then stood in his name, to the name of some other person. Upon the 12th day of December Albee went to the bank, drew from his deposit therein the sum of $1,600, and deposited the amount so withdrawn in the name of his son, Charles P. Albee, Samuel Albee, trustee. At the time of this transaction he informed the treasurer of the bank that he made the transfer for the purpose of avoiding taxation. Samuel Albee received at this time from the bank a deposit book which contained the following entries: "No. 5362. Charles P. Albee of Rockingham, Vermont, in account with Connecticut River Savings Bank," "Connecticut River Savings Bank in account with Charles P. Albee, Samuel Albee trustee."

This deposit book Samuel Albee took home and placed among his private papers where he kept the same until the time of his death. To the amount so deposited he added several other deposits, and from that amount withdrew at different times various sums. After his death the book was found among the

papers of the said Samuel Albee, and Charles P. Albee, who was then present, at first made no claim to it.

Subsequently the defendant, Henry C. Lane, was appointed administrator of the estate of Samuel Albee and as such took the deposit book into his custody ; whereupon the defendant, Charles P. Albee, immediately demanded the same of the administrator, claiming to own it.

Charles S. Albee, a son of the defendant Charles P., testified that at some time previous to the death of his grandfather he overheard a conversation between Samuel Albee and his father in which Samuel said : "I have just been over to Charlestown and made a deposit in the bank there in your name for you, Charles." This evidence was received subject to the objection and exception of the defendant Lane.

Ruth McQuaid, Simon Albee and Harry Albee testified that Samuel Albee had told them at various times in his life time that the money so deposited by him in the name of Charles P. Albee was his money as much as any money he had, and that the same was under his control. This testimony was admitted subject to the objection and exception of the defendant, Charles P. Albee, and from it the master found in his supplemental report, that the said deposit was made by Samuel Albee for the purpose of avoiding taxation, and that he intended to keep said money so deposited by him as his own money without abandoning the ownership or control thereof.

George A. Weston and *Gilbert A. Davis*, for the defendant Lane.

1. The transaction having been in New Hampshire, the law of that state must govern. Sto. Conf. Laws, s. 362, *passim*.

2. By that law the intention is a question of fact to be found by the trier of fact. *Blaisdell* v. *Locke*, 52 N. H. 238 ; *Marcy* v. *Amazeen*, 61 N. H. 131 ; *Smith, Admr.* v. *Ossipee Valley Ten Cent Savings Bank*, (Decided in New Hampshire, March 11, 1887.)

3. The same is true of the law in Vermont. *Sargent* v. *Baldwin*, 60 Vt. 17; *Tillotson* v. *Prichard*, 60 Vt. 95; *Barber* v. *Thompson*, 49 Vt. 213; *Pope* v. *Savings Bank*, 56 Vt. 584; *Taylor* v. *Henry*, 48 Md. 550; *Miner* v. *Rogers*, 40 Conn. 512.

4. There must have been an acceptance of the gift. *Maynard* v. *Maynard*, 10 Mass. 456; *Samson* v. *Thornton*, 3 Md. 275; *Chase* v. *Breed*, 5 Gray 440.

5. The mere fact of a deposit in the name of a third person will not create a trust for the benefit of that person. *Clark* v. *Clark*, 108 Mass. 582; *Broderick* v. *Waltham Savings Bank*, 109 Mass. 149; *Powers* v. *Providence Institution for Savings*, 124 Mass. 377; *Cummings* v. *Bramhall*, 120 Mass. 522; *Eastman*, v. *Woronoco Savings Bank*, 136 Mass. 208.

Waterman, Martin & Hitt, for the defendant, Albee.

This was a perfected voluntary trust. *Barber, Admr.* v. *Thompson*, 49 Vt. 213; Hill Trustees, 100; *Howard* v. *Savings Bank*, 40 Vt. 597; 1 Perry Trusts, ss. 98, 104; *Barker* v. *Frye*, 75 Me. 29; *Sargent* v. *Baldwin*, 60 Vt. 17; *In re* Gaffney's Estate, 23 Atl. Rep. 163; *Martin* v. *Funk*, 75 N. Y. 134; *Ellison* v. *Ellison*, 6 Ves. 656.

Evidence of the donor's declarations after the making of the deposit was inadmissible. *Bullard* v. *Billings*, 2 Vt. 309; *Edgell* v. *Bennett*, 7 Vt. 534; *Hough* v. *Barton*, 20 Vt. 455; *Halloran* v. *Whitcomb*, 43 Vt. 306; *Loland* v. *Fanham*, 25 Vt. 553; *Ross* v. *White*, 60 Vt. 558; *Brackett* v. *Wait*, 6 Vt. 411; *Sargent* v. *Largent*, 18 Vt. 371; *Hackett* v. *Amsden*, 59 Vt. 553; *Washburn* v. *Ramsdell*, 17 Vt. 299; *Haywood Rubber Co.* v. *Dunklee*, 30 Vt. 29.

The opinion of the court was delivered by

THOMPSON, J. 1. A completed trust, although voluntary, is valid and may be enforced in equity. It is not essential to its validity that the beneficiary should have had notice of its creation

or have assented to it. The owner and donor of personal property may create a perfect, or complete trust, by his unequivocal declaration in writing or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself, or another person, the trustee. "He need not in express terms declare himself trustee, but he must do something equivalent to it, and use expressions which have that meaning." The act creating the trust must be consummated and not rest in mere intention. "It must appear from written or oral declarations, from the nature of the transaction, the relation of the parties and the purpose of the gift, that the fiduciary relation is completely established." This is the rule whether the donor makes himself or another person the trustee. If he constitutes himself trustee it is not necessary as between himself and the beneficiary, that he should part with the possession of the trust property. "If the donor retains the legal title but effectually declares himself a trustee for the donee, thus clothing the donee with the beneficial estate, the gift is valid although voluntary; the donee's rights are perfect and equity will enforce them against the donor, and all persons claiming under him as volunteers." The trust once created cannot be revoked by the donor, unless the power of revocation is reserved by the donor, when he created it. "A voluntary trust which is still executory, incomplete, imperfect or promissory, will neither be enforced nor aided." "If the intention is to make such a transfer as would constitute a gift, but the transaction is imperfect for this purpose, the court will not hold the intended transfer to operate as a declaration of trust; 'for then every imperfect instrument would be made effectual by being converted into a perfect trust.'"

Such is the general doctrine in regard to voluntary trusts as laid down by elementary writers on the subject, and as enunciated by the courts in the best considered and leading cases in which it has been discussed. 2 Pomeroy's Eq. Juris. (1st Ed.) ss.

996, 997, 998; Perry Tr. (1st Ed.) ss. 96, 97, 98, 99, 104, 105; Adams' Eq. (6th Am. Ed.) 194; *ex parte* Pye, 18 Ves., Jr., 149; *Milroy* v. *Lord*, 4 De G., F. &. J. 264; *Kekewich* v. *Manning*, 1 De G., M. & G. 176; *Ellison* v. *Ellison*, 1 Lead. Cas. Eq. (3d Am. Ed.) 297 and notes; *Richards* v. *Delbridge*, L. R. 18 Eq. 11; *Heartley* v. *Nicholson*, L. R. 19 Eq. 233; S. C. 11 Eng. Repts. (Moak's notes) 816; *Jones* v. *Lock*, L. R. 1 Ch. 25; *Martin* v. *Funk*, 75 N. Y. 134; S. C. 31 Am. Rep. 446; *Young* v. *Young*, 80 N. Y. 422, S. C. 36 Am. Rep. 634; Est. of Webb, 49 Cal. 541; *Stone* v. *Hackett*, 12 Gray 227; *Urann* v. *Coates*, 109 Mass. 581; *Gerrish* v. *Bank*, 128 Mass. 159; *Ray* v. *Simmons*, 11 R. I. 266, S. C. 23 Am. Rep. 44 and note; *Minor* v. *Rogers*, 40 Conn. 512; S. C. 16 Am. Rep. 69; *Taylor* v. *Henry*, 48 Md. 550, S. C. 30 Am. Repts 486; *In re* Gaffney's Est. 146 Pa. 49 (23 Atl. Rep. 163); *Pope* v. *Bank*, 56 Vt. 284; *Sargent* v. *Baldwin*, 60 Vt. 17.

These are only a few of the many cases bearing upon this subject, but they sufficiently illustrate it. A large number are collected in note 1 to Sec. 997 of Pom. Eq. Juris. (1st Ed.).

In the case at bar, Samuel Albee deposited in the Connecticut River Savings Bank $1,600 in the name of his son, the defendant, Charles P. Albee, naming himself trustee. The treasurer of the bank at the same time delivered to Samuel Albee a deposit book, on the outside cover of which was the entry: "No. 5362. Charles P. Albee, of Rockingham, Vt., in acct. with Conn. River Savings Bank," and in the book is this entry: "Conn. River Savings Bank in acct. with Charles P. Albee (Samuel Albee, trustee)." "Dec. 12, 1878, deposit, $1,600." This book was retained by Samuel Albee until his death. While he held this book and after the first deposit he made one deposit to this account, and on several occasions drew various sums of money from it, receipting therefor as trustee. In form at least, this transaction created a voluntary trust in favor of Charles P. Albee by Samuel Albee, in which the latter constituted and declared

himself to be the trustee. The fact that he stated that he made the transfer to avoid taxation does not negate the idea that he also intended to create a trust for the benefit of Charles P., but on the contrary it is perfectly consistent with that purpose. The retention of the book is not inconsistent with this construction. If there was a trust, he must be deemed to have retained it as trustee. In *Martin* v. *Funk*, *supra*, it is said: "There are many cases where the instrument creating the trust has been retained by the author until his death, especially where he made himself the trustee, and yet the trust sustained." Such fact, among others, has been considered on the question of intent, in those courts which hold the creation of the trust to be one of intent on the part of the alleged donor, although he may have made the deposit in the name of the alleged donee, but it is never deemed decisive against the validity of the trust.

If the intent with which Samuel Albee made this deposit were to be held to be decisive of the rights of the parties to this litigation, what other intent, on the facts found from admissible evidence, can be imputed to him, than such as his acts at that time imported? He directed the bank to make the deposit in the manner and form it did, and he took the deposit book, the voucher, to himself in trust for Charles P. Albee. There was no contingency or uncertainty in the circumstances, and the transaction was complete. The money was deposited absolutely and unqualifiedly in trust, and Samuel Albee himself was the trustee. So far as is disclosed by legal evidence, he never said nor did anything thereafter, inconsistent with that transaction, viewed on the theory that such a trust was intended to be created by him. The fact that he deposited other money to this account, and as trustee drew money from it, is perfectly consistent with his being trustee.

We think there was a perfect, completed, voluntary trust created by this transaction. *Martin* v. *Funk*, *Ray* v. *Simmons*, *Minor* v. *Royers*, *In re* Gaffney's Est., *supra*, and other authorities there cited.

But we are not left to infer the intention of Samuel Albee from the transaction of making the deposit, for very near and after that occurrence, he declared that he made the deposit for the benefit of Charles P. We think a fair construction of the master's original report is that he finds such was his intention. This establishes the trust, if it were to be determined by the law of New Hampshire as found by the master, and stated in *Blasdel* v. *Locke*, 52 N. H. 238, and *Marcy* v. *Amazeen*, 61 N. H. 131, or in accordance with certain Massachusetts cases cited on defendant Lane's brief, Pt. 5.

The case of *Pope* v. *Bank*, 56 Vt. 284, is distinguishable from this case. In that case, there was no declaration of trust, but an imperfect gift. The intestate retained in himself the absolute control and disposal of the deposit, for his own use and benefit, making it payable to himself by the terms of the deposit.

2. The testimony of the witnesses, Ruth McQuaid, Simon Albee and Harriett Albee, as to the declarations of the intestate in respect to the deposit, and made after the trust had been created, were not admissible. "No such declarations made after the creation of the trust could have any legitimate effect upon it." *Ray* v. *Simmons*, *supra*; *Mutual Ins. Co.* v. *Deale*, 18 Md. 26, S. C. 79 Am. Dec. 673; *Minor* v. *Rogers*, *supra*; *Bullard* v. *Billings*, 2 Vt. 309; *Brackett* v. *Wait*, 6 Vt. 411; *Edgell* v. *Bennett*, 7 Vt. 534; *Sargeant* v. *Sargeant*, 18 Vt. 371; *Hough* v. *Barton*, 20 Vt. 455; *Leland* v. *Farnham*, 25 Vt. 553; *Washburn* v. *Ramsdell*, 17 Vt. 299; *Hayward Rubber Co.* v. *Dunklee*, 30 Vt. 29; *Halloran* v. *Whitcomb*, 43 Vt. 306; *Ross* v. *White*, 60 Vt. 558; *Sargent* v. *Baldwin*, 60 Vt. 17.

As before stated when a voluntary trust is once created, it cannot be annulled by the act or declarations of the party creating it, unless a power of revocation is reserved for that purpose. See *Sargent* v. *Baldwin*, *supra*, and cases there cited. No such power was reserved by Samuel Albee.

3. The testimony of Charles S. Albee in respect to the declarations of Samuel Albee as to his intent in making the deposit, and the reason that moved him to do it, was properly admitted. "The declarations of a trustee can be given in evidence to show how he held the estate; that is in those states where the trust may be proved by parol." Perry Tr. (1st Ed.) s. 77; s. 147. "The declarations of deceased persons made against their interest or right, are admissible against those who claim in the interest or right of such deaceased persons." *Wheeler* v. *Wheeler's Est.*, 47 Vt. 637, 645; 2 Saund. Pl. & Ev. 557; *Ivat* v. *Finch*, 141 Taunt. 1; 1 Greenl. Ev. (12th Ed.) s. 189.

The decree of the Court of Chancery is affirmed and cause remanded.

ORLEANS COUNTY.

MAY TERM, 1892.

PRESENT: ROSS, Ch. J., ROWELL, TYLER, AND THOMPSON, JJ.

H. G. BANISTER *v.* CURTIS D. OVITT.

Competency of witnesses. Husband and wife. Party in interest. Contract in issue.

1. When the wife is a party in interest, though not of record, the husband is not a competent witness.
2. The action being for the conversion of certain hay by feeding it out, a person who claimed to own the hay by reason of the fact that it was cut upon her land, and by whose direction the defendant fed it to her stock supposing it to be hers, is a party in interest.
3. The plaintiff claimed title under a chattel mortgage. *Held*, that the contract evidenced by this instrument was collateral to the issue on trial, and that the plaintiff might be a witness in his own behalf notwithstanding that the mortgagor was dead.

Trover for the conversion of certain hay. Trial by jury at the February term, 1892, Start, J., presiding. Verdict and judgment for the defendant. The plaintiff excepts.

The plaintiff claimed title to the hay in question under a chattel mortgage from one E. K. Hunt. His evidence tended to show that said hay was cut upon land belonging to the said E. K. Hunt and stored in a barn standing upon land the title to which was in his wife, Nancy A. Hunt, but which he, the said E. K. Hunt, was then occupying.

H. G. Banister *v.* Curtis D. Ovitt.

The defendant claimed that the hay was cut upon the land of the said Nancy A. Hunt, and was her hay, and that he fed it out to her stock by her direction, which was the conversion complained of, and introduced the testimony of the said Nancy A. Hunt, and her then husband, Alfred Hunt, to that effect. The plaintiff objected that her husband was incompetent as a witness for that Nancy A. Hunt was a party in interest. The Court found that she had a pecuniary interest, if the facts testified to by her and her husband tended to show one, and admitted the evidence of her husband under the plaintiff's exception.

The plaintiff offered himself as a witness to prove that the hay sued for was part of that covered by the mortgage. It appeared that the mortgagor, E. K. Hunt, was dead, and the defendant objected that for this reason the plaintiff was incompetent as a witness. The Court sustained the objection and excluded the testimony, against the exception of the plaintiff.

Dickerman & Young, for the plaintiff.

The defendant being the mere servant of Nancy A. Hunt, and acting in good faith, she was liable to indemnify him in the premises, and is the real party in interest. Hence her husband was incompetent as a witness. *Adamson* v. *Jarvis*, 4 Bing. 66; 1 Hill on Torts, 195 note; *Carpenter*, *Ex'r.*, v. *Moore et al*, 43 Vt. 392; *Wheeler* v. *Wheeler's Est.*, 47 Vt. 646.

A judgment against the defendant would be conclusive against her. *Emery* v. *Fowler*, 39 Me. 327; *Ferris* v. *Arden*, Cro. Eliz. 667; *Kennersly* v. *Orpe*, Doug. 517; *Strutt* v. *Bovington*, 5 Esp. 56; *Downs* v. *Belden*, 46 Vt. 674; *Bank* v *Schofield*, 39 Vt. 590; *Cole* v. *Shurtleff*, 41 Vt. 311; *Morse*, *Ex'r.*, v. *Low*, 44 Vt. 561.

O. S. Annis and *W. W. Miles*, for the defendant.

To render the husband of Nancy A. Hunt incompetent as a witness she must be an actual party to the suit. *Willey*, *Admr.*, v. *Hunter*, 57 Vt. 479; *Knapp* v. *Town of Marlboro*, 31 Vt. 674.

H. G. Banister *v.* Curtis D. Ovitt.

The plaintiff was incompetent to testify as to the mortgage, since the mortgagor, under whom he claimed, was dead. *Hall* v. *Hamblett*, 51 Vt. 589; *McKellop* v. *Jackman et al*, 50 Vt. 57; *Woodbury* v. *Woodbury's Est.*, 50 Vt. 152; *Davis* v. *Windsor Savings Bank*, 48 Vt. 529.

The opinion of the court was delivered by

ROWELL, J. The court below found that Mrs. Hunt has a pecuniary interest in the event of this suit if her testimony and that of the defendant tended to show such interest, and if it did, that she had such an interest as it tended to show.

Their testimony tended to show that the hay in question was cut on Mrs. Hunt's farm, stored in her barn, and belongs to her, and that the defendant fed it to her stock by her direction, supposing it to be hers.

This makes her interested in the event of the suit; for he who employs another to do an act in respect of which the employe is innocent and which the employer appears to have a right to authorize him to do, is treated as undertaking to indemnify the employe therefor, if the act would have been lawful had the employer had the authority he claimed to have. *Adamson* v. *Jarvis*, 6 Bing. 66; *Howe* v. *Buffalo, N. Y. & Erie R. R. Co.*, 37 *N. Y.* 297; Cooley on Torts, 144 et seq.; Story on Agency, s. 339; Cf. *Emery* v. *Fowler*, 39 Me. 326-63 Am Dec. 627.

It is not necessary to determine whether a judgment against the defendant would be conclusive on Mrs. Hunt, it not appearing that she has been vouched in to defend; for if not conclusive, her liability as indemnitor would remain nevertheless.

Mrs. Hunt being a party in interest though not of record, her husband was not a competent witness. *Labaree* v. *Wood*, 54 Vt. 452.

The cause of action in issue and on trial being the conversion of the hay, the matter of giving the chattel mortgage on which

the plaintiff relied for title was collateral, and therefore the plaintiff was a competent witness notwithstanding the death of the mortgagor. *Downs* v. *Belden*, 46 Vt. 674.

Judgment reversed and cause remanded.

JAMES McEWEN *v.* B. P. SHANNON & CO.

Fraudulent agreement not enforceable. Money paid under not recoverable. Right of partner to settle. Wife of co-partner not a witness for or against co-partnership.

1. The court will not enforce the performance of a fraudulent agreement for the payment of money, nor will it assist one paying money under such an agreement to recover the amount so paid.
2. Where several persons for the purpose of inducing each other to have their cream manufactured into butter at a certain place, mutually agree to pay a certain price per pound for this service, a secret agreement between one of these persons and the company, which is to do the manufacturing, that the cream of that person shall be manufactured for a less price is fraudulent.
3. One of the defendants made such an agreement with the plaintiff and subsequently and while the agreement was in force formed a partnership with the other defendant. In settlement of subsequent dealings between the plaintiff and the co-partnership, the first named defendant allowed the plaintiff the amount due him under the secret agreement, thus finding a small balance due from the co-partnership, for which a due bill was given. *Held*, that the plaintiff might recover according to the settlement, it not appearing that either the defendant firm or that member of the firm who made the settlement were insolvent.
4. The wife of a co-partner is disqualified to the same extent in a suit against the co-partnership that she would be were the suit against her husband alone.

Assumpsit. Heard at the February term, 1892, Start, J., presiding, upon the report of a referee. Judgment *pro forma*

for the defendants to recover $106.92. The plaintiff excepts. The opinion states the case.

W. W. Miles and *H. F. Graham*, for the plaintiff.

If the contract was illegal a payment under it cannot be recovered. *Burt* v. *Place*, 6 Cowen 431; *Foote & Stone* v. *Emerson*, 10 Vt. 337.

One partner can bind the firm as to all acts relating to the business. *Winship* v. *U. S. Bank*, 5 Peters, 525-561; *Sandilands* v. *Marsh*, 2 B. & Ald. 673; *Bond* v. *Gibson*, 1 Camp. 185.

The wife of B. P. Shannon was not a competent witness. *Carpenter* v. *Moore*, 43 Vt. 392; *Labaree* v. *Wood*, 54 Vt. 452; 2 Best Ev. 310; 9 Am. Enc. Law 806.

Bates & May, for the defendant.

The partnership of Shannon & Son was under no obligation to carry out and never assumed the obligation of B. P. Shannon. *Lyndon Mill Co.* v. *Lyndon Inst.*, 63 Vt. 581.

B. P. Shannon had no right to offset the amount due under the secret agreement in the settlement with Shannon & Son. 1 Lindley Part. 292 et seq; Passons Part. 163 et seq; *Warden* v. *Newdigate*, 52 Am Dec. 567.

The secret agreement was illegal. *Gardner* v. *Morse* 25 Maine 140; *Fitzgerald* v. *Railroad Co.*, 63 Vt. 169; *Atlee* v. *Fink*, 42 Am. Rep. 385 and note; *Freeman Ch. Ass'n* v. *Bergham*, 13 La. An. 209; *Woodman* v. *Innes*, 27 Pac. Rep. 125; Add. Torts, s. 220, 225.

The wife of B. P. Shannon was a competent witness. *Dawson* v. *Waite*, 41 Vt. 626; *Bradish* v. *Belknap*, 46 Vt. 1; *State* v. *Bridgeman*, 49 Vt. 202; R. L. s. 1000; *Willey* v. *Hunter*, 57 Vt. 479; *Peaslee* v. *McLow*, 82 Mass. 488; *Gay* v. *Johnson*, 45 N. H. 587; *Carlisle* v. *Sheldon*, 38 Vt. 440; Dic. Par. 154; *Douglas* v. *Gardner*, 63 Me 462; *Arnold* v. *Renshaw*, 11 N. J. L. 318; *Gibbs* v. *Bryant*, 1 Pick 118; *Sheldon* v. *Quinlen*, 5 Hill 441.

The opinion of the court was delivered by

ROSS, Ch. J. From the report of the referee and auditor, it appears, that, in the spring of 1888, the defendant, B. P. Shannon and others were interested in having a creamery established in the town of Craftsbury. For its establishment it was necessary to induce the farmers in the vicinity to adopt uniform regulations for producing pure cream, by the use of the Cooley Creamers; and to patronize a creamery for its manufacture into butter. It could not be expected that one patron would pay more than another for gathering and manufacturing cream into butter. Hence a uniform charge for this work was essential. The plaintiff was an influential dairyman in the vicinity. The defendant, B. P. Shannon, desired to put in the creamery, gather and manufacture the cream into butter. The promoters of the scheme, among whom was the defendant, B. P. Shannon, established the price of four cents per pound for gathering the cream and manufacturing it into butter. To secure the influence of the plaintiff and to induce him to sign the common agreement to furnish cream from his dairy to the creamery to be established by the defendant, B. P. Shannon, to be gathered and manufactured into butter at four cents a pound, a secret agreement was entered into, that, while the plaintiff should enter the association, and sign the common agreement, and to appearance pay four cents per pound for gathering and manufacturing his cream into butter, he was to be paid back three cents per pound, or have his cream gathered and manufactured for one cent per pound. This was the agreement between the plaintiff and B. P. Shannon for 1888. During that summer Arthur Shannon, the son of B. P. Shannon, became interested in operating the creamery, but was not informed of the secret agreement between his father and the plaintiff. During all that year the plaintiff in the settlements from time to time, made through the association of which he was an officer, allowed the defendants four cents per per pound for gathering and manufacturing his cream. In

December of that year B. P. Shannon without the knowledge of his son and partner, to induce the plaintiff to sign the common agreement and to influence others to sign, to patronize the creamery for the year 1889, and to pay for gathering and manufacturing the cream into butter four cents per pound, entered into a secret agreement to purchase the plaintiff's butter for that year for twenty-five cents per pound. The plaintiff signed the common agreement and in the settlements received his proportionate share of the money received, deducting for gathering and manufacturing the cream into butter four cents per pound. By the common agreement the butter resulting from the manufacture of the cream furnished by the plaintiff remained his property. It is found that the son would not have become a party to the last secret agreement if he had been consulted in regard to it. It was signed by the name of the partnership. The defendants purchased of the plaintiff some butter in the winter of 1889 which did not fall within either of the common agreements. The plaintiff had also had property of the defendant which did not fall within the common agreements. In October, 1889, the plaintiff and defendant, B. P. Shannon, undertook to settle for the winter butter, and the draw-back of three cents per pound on the butter manufactured for the plaintiff in the season of 1888, and certain charges which the defendants had against the plaintiff. They went so far as to find a balance of $29.53 due the plaintiff. For this balance the wife of B. P. Shannon wrote and delivered to the plaintiff his exhibit B, which reads:

"CRAFTSBURY, Oct. 28, 1889.

To balance due on winter butter, $29.53 (twenty-nine dollars and fifty three cents), to James McEwin from B. P. Shannon & Son."

It is found that there were $6 more due the defendants than was embraced in this settlement, on one of the items included in the settlement. These are the controlling facts found.

The plaintiff seeks to recover the sum embraced in the due

bill, reduced by the $6, and the amount which he claims is due him by the secret agreement for the cream furnished by him the second year.

The defendants claim to recover on their action in set-off the $6 and what was allowed by B. P. Shannon in the settlement of October, 1889, on the secret agreement for the first year.

1. It is apparent that the secret agreements between the plaintiff and B. P. Shannon, if enforced, would be a fraud upon the other patrons of the creamery. The establishment of the creamery was a *quasi* joint enterprise. In that vicinity it could not be established unless the dairymen could be induced to patronize it pretty generally. This was recognized by the agent of the Cooley system, by B. P. Shannon and by the plaintiff. They assumed that the plaintiff's standing was such that his signature to the common agreements would induce others to sign. It is to be presumed it did induce others to sign. If the secret agreements with him had been known they would have had the opposite effect. By them he was securing an advantage over the other common patrons, while apparently he was sharing the burdens of the enterprise equally with them. When such is the case courts will not enforce the secret agreements, nor help either party in regard to them. It will leave the parties where they have placed themselves. It treats all such secret agreements which work a fraud upon the rights of others as illegal and refuseses to enforce them. *White Mts. R. R.* v. *Eastman*, 34 N. H. 142 and cases cited; *Paddock* v. *Fletcher*, 42 Vt. 389.

In general an action cannot be maintained on an illegal contract, either to enforce it directly, or to recover money paid on it after its execution. *Webb* v. *Hulchire*, 3 Ired. 485, (40 Am. Dec. 419); note to *Boyd* v. *Barclay*, 34 Am. Dec. 762.

A contract is illegal when it violates good morals, or is opposed to public policy, or is infected with fraud, or violates the provisions of a public statute. *Ohio L. I. & T. Co.* v. *M. I. & T. Co.* 11 Humph. 1, (53 Am. Dec. 742, and note); *Bank of*

New Haven v. *Perkins*, 86 Am. Dec. 332. *Schmidt* v. *Barker*, 17 La. Ann. 261, 87 (Am. Dec. 527); *Bowman* v. *Gonegal*, 19 La. Ann. 328, (92 Am. Dec. 537); *Tatum* v. *Kelley*, 25 Ark. 209, (94 Am. Dec. 717.)

The common law, unless modified by statute, when applicable, is the law of this State by Statute R. L. 689.

Conveyances of property in fraud of creditors were void by common law, as well as by statute, and courts would not interfere to relieve either party. *Martin* v. *Martin*, 1 Vt. 91; Roberts' Digest, 345; *placitum* 19. Having received what was due him under the common agreement for cream furnished the second year, this Court will not aid the plaintiff to recover, what would be due him on the second year's business under the secret agreement, which if enforced would give him an advantage over the other patrons of the creamery, and for that reason was fraudulent as to them.

2. For like reason this Court will not aid B. P. Shannon to recover back what he paid the plaintiff on the secret agreement of the first year's business. But the defendants contend that inasmuch as the son was not a party to the secret agreement of the first year, B. P. Shannon had no right against the defendants, as partnership, to apply credits due them, as such partnership, from the plaintiff to settle what was due from B. P. Shannon to the plaintiff by the secret agreement of the first year. This suit is not brought to settle the partnership business between B. P. Shannon and his son. Neither does it appear that the defendant B. P. Shannon, nor, that the partnership is insolvent. If B. P. Shannon appropriated partnership credits to pay the plaintiff what he owed him by the terms of the secret agreement the first year, it does not appear but that he is able to account therefor with his son. As a partner B. P. Shannon was fully authorized to settle with the plaintiff for his winter butter. To enforce the balance found due the plaintiff by the settlement for the winter butter, the court is not called upon to enforce the

fraudulent secret agreement. Such enforcement leaves the parties to that agreement where they have placed themselves. It compels the defendant partnership to pay the balance due the plaintiff for his winter butter. This is justly his due. But this balance found by the settlement must be reduced by the sum of $6.00 which is found due from the plaintiff to the defendants.

3. The wife of B. P. Shannon was incompetent to testify to the payment of the $30 to the plaintiff. That item must be disallowed to the defendants. Whether the partnership is the defendant as contended, or the partners are the defendants, B. P. Shannon is directly interested in whatever judgment may be rendered.

Any judgment in favor of the plaintiff would be against him personally, and could be wholly satisfied out of his individual property. He would also be personally and directly interested in any judgment against the plaintiff. R. L. 101, removes the disqualification, not of a *party*, merely, but of *interest*. *Bonett* v. *Stowell*, 37 Vt. 258; *Carpenter* v. *Moore*, 43 Vt. 392; *Labaree* v. *Wood*, 54 Vt. 452.

Judgment reversed, and judgment for the plaintiff to recover $23.53, with interest from Oct. 22, 1889, and costs.

STATE *v.* E. G. STEVENS.

Intoxication. Question of limitation raised by demurrer.

An indictment for intoxication which alleges that the offence was committed on a date more than thirty days before the filing of the indictment in court, is not for that reason bad on demurrer, for the filing of the indictment is not necessarily the commencement of the prosecution.

Indictment for intoxication. Heard on demurrer to the indictment at the February term, 1891, Tyler, J., presiding. Demurrer overruled. The respondent excepts.

Dickerman & Young, for the respondent.

The filing of an indictment is the commencement of the prosecution. *State* v. *J. P.*, 1 Tyler 283; *Com.* v. *Cheney*, 6 Mass. 347; *Com.* v. *Stone*, 3 Gray 453; *Com.* v. *Wood*, 4 Gray 11–15; *State* v. *G. L.*, 1 Tyler 295; *Vaughn* v. *Congdon*, 56 Vt. 111.

Every issuable allegation must be laid with certainty as to time and place. *State* v. *LaBore*, 26 Vt. 765; *State* v. *Litch*, 33 Vt. 67; *State* v. *Bacon*, 7 Vt. 219; 4 Black. Com. 306; Chit. Crim. Law, 169; Whart. Crim. Law, 122; *State* v. *O'Keefe*, 41 Vt. 691; *State* v. *Kennedy*, 36 Vt. 563.

Where time is material it must be accurately stated and proved as laid; and if upon the face of the indictment the offense is barred that can be taken advantage of by demurrer or motion in arrest. *State* v. *Robinson*, 29 N. H. 274; *State* v. *Cavelry*, 51 N. H. 446; Whart. Crim. Law, 114; 4 Black. Com. 306; *Vaughn* v. *Congdon*, 56 Vt. 111–115; Whart. Crim. Law, 184, 684; *State* v. *Litch*, 33 Vt. 67; *Com.* v. *Doyle*, 110 Mass. 103; *State* v. *Robinson*, 29 N. H. 274; *State* v. *Hunkins*, 43 N. H.

557; Bish. Crim. Proced., § 405; *State* v. *Cavelry*, 51 N. H. 446; *State* v. *Munson*, 40 Conn. 475; *Vaughn* v. *Congdon*, 56 Vt. 111-116; *Hartland* v. *Windsor*, 29 Vt. 354.

W. W. Miles, State's Attorney, for the State.

The same rules apply to civil and criminal cases. 1 Chit. Pl. p. 213; *State* v. *Whitney*, 15 Vt. 298; *Sherbon* v. *Com*, 8 Wats, 212; *State* v. *Cormack*, 2 McCarter 305.

A statement of real time is not necessary. 1 Chit. Pl. p. 257; *State* v. *Sam*, 2 Dev. 567; *State* v. *Haney*, 1 Hawk 460.

The question of limitation cannot be raised by demurrer. *U. S.* v. *Cooke*, 17 Wall. 168.

The opinion of the court was delivered by

MUNSON, J. This is an indictment for intoxication, founded on No. 36, Acts of 1888. The offense is punishable only when prosecution is commenced within thirty days after its commission. The indictment was filed in court on the sixth day of September, 1890. It alleges an offense committed on the fifth day of July, 1889. The indictment is demurred to.

The respondent contends that inasmuch as the provision of limitation is without exception, the indictment must show an offense committed not more than the prescribed time before the date of its filing. This contention might be sound, if it were also true that the indictment is in all cases the commencement of the prosecution. But the indictment may be a proceeding in continuation of a prosecution previously commenced. This being so, we think an indictment should not be held insufficient because it appears that more than the permitted time elapsed between the date assigned to the commission of the offense, and the filing of the indictment.

In cases where the respondent has been brought before a justice and held for the action of the County Court, the files in the possession of that court will show whether the prosecution was seasonably commenced. We think a respondent should not be

permitted to raise this question in any manner that will prevent a reference to the filing upon the complaint, in cases where complaint was made. No reason occurs to us for requiring that an indictment be so framed as to show prior proceedings which are evidenced by the files in the case. It cannot impair the rights of the respondent to require him to raise the question of limitation in a manner that will bring all the papers before the court.

Judgment affirmed and cause remanded.

Patrick A. Roach *v.* Matthew J. Caldbeck.

CALEDONIA COUNTY.

MAY TERM, 1892.

PRESENT: ROSS, Ch. J., TAFT, ROWELL, AND TYLER, JJ.

PATRICK A. ROACH *v.* MATTHEW J. CALDBECK.

How far stenographic transcript a part of exceptions. Exclusion of unanswered question not error. Assault and battery. Damages. Pecuniary ability. Criminal conviction. Evidence.

1. Where the stenographic transcript of the trial is referred to by the exceptions for certain purposes, it is before the Supreme Court only in those particulars.

2. Error cannot be predicated upon the exclusion of a question merely; it must appear what the answer would have been and that its exclusion was erroneous.

3. In an action for assault and battery evidence of the pecuniary ability of the defendant is not admissible upon the question of actual damages.

4. In such an action evidence of the relations of the parties at the time of the assault is admissible, but evidence of past controversies is not, although they may have lead up to the affray.

5. It was error to permit the plaintiff to show that the defendant entered a complaint against him for intoxication directly after the assault.

6. Evidence that the defendent has been criminally prosecuted and paid a fine for the same assault is not admissible upon the question of exemplary damages.

Patrick A. Roach *v.* Matthew J. Caldbeck.

Trespass for an assault and battery. Plea, the general issue. Trial by jury at the December term, 1891, Start, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The testimony of both parties tended to show that on the 16th day of June, 1890, the defendant assaulted the plaintiff and struck him several blows. The plaintiff insisted that the assault was unprovoked and very aggravated. The defendant claimed upon the contrary, that he did not violently assault the plaintiff, and that he was provoked by the conduct of the plaintiff to make the assault which he did.

Upon this last point the defendant offered to show that for some six months previous to the time of the assault there had been in progress a controversy between the defendant, who was a catholic, and certain other catholics, in the village of St. Johnsbury, in reference to the education of catholic children in the public schools; that in this controversy the plaintiff had been opposed to the defendant and had taken all possible means to injure the defendant with his neighbors, and even in his own family, and to irritate and provoke him, and that the assault in question was the result of these past controversies. The court excluded this testimony under the exception of the defendant.

The plaintiff was allowed to show, against the exception of the defendant, that on the 23d day of June, 1890, the defendant entered a complaint against him for intoxication, upon which the plaintiff was prosecuted and found guilty.

The other questions raised by the exceptions and decided by the court sufficiently appear in the opinion.

Ide & Quimby and *Harry Blodgett*, for the defendant.

It was error to permit the plaintiff to show by the cross examination of the defendant what his pecuniary circumstances were. *Rea* v. *Harrington*, 58 Vt. 181.

The defendant should have been permitted to show the relations between himself and the plaintiff as bearing upon the question of exemplary damages; and in this view, the past con-

troversies between the parties were pertinent. *Fraser* v. *Berkely*, 7 C. & P. 621; *Moore* v. *Hill*, 62 Vt. 424.

The plaintiff should not have been permitted to show by the State's attorney that the defendant entered a complaint against him for intoxication. Such evidence is against public policy. *United States* v. *Moses*, 4 Was. C. C. 725; *State* v. *Soper*, 16 Me. 293; 32 Am. Dec. 665; *Rex* v. *Bardy*, 24 How. St. Tr. 808-811; *Rex* v. *Watson*, 2 Starkie, 136; *Rex* v. *Watson*, 32 How. St. Tr. 100; *Atty. General* v. *Briant*, 15 M. & W. 169; 1 Whart. Cr. Law, s. 776; *Humphrey* v. *Douglas*, 10 Vt. 71; *Humphrey* v. *Douglas*, 11 Vt. 22; *Bank* v. *Bank*, 27 Vt. 505; *Chatfield* v. *Wilson*, 28 Vt. 49; *In re* Foster, 44 Vt. 570.

That the defendant had been prosecuted criminally and paid his fine was admissible upon the question of exemplary damages. *Gilbraith* v. *Allen*, 10 Ind. 67; *Flannagan* v. *Wamack*, 54 Tex. 45.

Bates & May and *W. P. Stafford*, for the plaintiff.

That the defendant had been prosecuted criminally for the same assault, had no bearing upon the question of exemplary damages. *Edwards* v. *Leavitt*, 46 Vt. 126; *Hoadley* v. *Watson*, 45 Vt. 289; *Cook* v. *Ellis*, 6 I. Hill 466 and cases there cited.

It was proper to show the defendant's pecuniary means and social standing upon the question of damages. *Rea* v. *Harrington*, 58 Vt. 181; *Goldsmith's Admr.* v. *Joy*, 61 Vt. 488.

Causes provoking an assault are not admissible unless immediately preceding it so as to form a part of one transaction. Sedg. Dam. 639 and note, 5 Ed.; *Dupree* v. *Lentine*, 147 Mass. 580; *Jacaway* v. *Dula*, 7 Yerg. 82; S. C. 27 Am. Dec. 492; *Lee* v. *Woolsey*, 19 Johns. 319; S. C. 10 Am. Dec. 230; *Keiser* v. *Smith*, 71 Ala. 481; S. C. 46 Am. Rep. 342.

There was no error in permitting the plaintiff to show that the defendant had entered a complaint against the plaintiff for intoxication. This fact was brought out upon the cross-examina-

tion of the State's attorney, who had been introduced by the defendant for the purpose of showing the plaintiff's condition on the 16th and 23d days of June. The State's attorney made no objection to answering the question, and the Court properly admitted it as a matter of discretion. *Clark* v. *Field*, 12 Vt. 485; *Welcome* v. *Batchelder*, 23 Me. 85; *State* v. *Soper*, 16 Me. 293; *Worthington* v. *Scribner*, 109 Mass. 487 and cases therein cited.

The opinion of the court was delivered by

TAFT, J. 1. The question, whether there was error in the plaintiff's answer in respect of the defendant's prominence in society, is not shown by the record. It appears in the transcript of the trial, and the transcript is referred to for certain purposes, but not for the purpose of showing that exception. Therefore it is not before us and is not considered.

2. The plaintiff was asked upon cross-examination this question, "Mr. Caldbeck took care of you at times when you were sick," and the defendant was asked in his examination in chief, "You have stated you have been acquainted with Mr. Roach for years, were boys together, want to know if you had seen him so that you knew how he looked, how he appears at times when he was coming out of these spells of intoxication?" The plaintiff objected to both questions and the answers were excluded. What the answers would have been, had they been given, is not shown; therefore error does not appear.

3. The Court admitted evidence of the defendant's pecuniary ability, what property he had, its value, and what incumbrances were on the same, as bearing upon the question of actual damages. Such is the construction we give the bill of exceptions. Upon the subject of actual damages the evidence was inadmissible, and in its admission there was error. As the testimony was not admitted upon the subject of exemplary damages, we have no occasion to pass upon that question.

4. The Court committed no error in rejecting the defendant's offer of evidence respecting the controversies of the parties

for some months prior to the assault. The ruling of the Court was as favorable to the defendant as the law permitted. The relations of the parties at the time of the assault, was a proper subject of inquiry upon the trial, but the details of their past controversies would afford scant light to aid the jury in determining any of the questions then being solved, and would have brought forth, judging from the offers of evidence, a flood of interminable collateral questions, not in the least germane to the points in issue between the parties.

5. The Court permitted the plaintiff to show that the defendant entered a complaint against the plaintiff in a prosecution for intoxication. In this there was error. We can see no ground upon which that fact was admissible, and public policy requires that the names of informers should not be disclosed.

6. Did the Court err in not complying with the denfendant's request, that having been prosecuted criminally for the assault upon the plaintiff, and paid his fine, that fact might be taken into account and considered by the jury in reduction of exemplary damages? This point was ruled against the defendant in *Hoadley* v. *Watson*, 45 Vt. 289. And this ruling seems to be required by the principle stated by Wheeler, J., as governing the award of exemplary damages, in *Earl* v. *Tupper*, *Ibid*, 275, viz: "That the jury, in cases proper for exemplary damages, are to be governed wholly by the malice or wantonness of the defendant, as shown by the conduct they find him liable for in the action, in awarding them." The same learned judge in *Hoadley* v. *Watson*, *supra*, says: "Exemplary damages are not given in lieu of punishment." We are not disposed to overrule *Hoadley* v. *Watson*, and therefore hold there was no error in the refusal of the Court to comply with the request, nor in the charge as given. These are all the questions insisted upon.

Judgment reversed and cause remanded.

George P. Blair, Admr., *v.* The Heirs, etc. of Johnson.

GEORGE P. BLAIR, ADMR., *v.* THE HEIRS, &c., OF JOHNSON.

Equity. Construction of will. Jurisdiction. Costs.

1. An orator must stand upon the allegations in his bill, and an allegation in an answer, not responsive to the bill, is not an element in the case.
2. The jurisdiction of the Court of Chancery in the settlement of the estates of deceased persons is not original, but special and limited, and only in aid of the Probate Court when the powers of that court are inadequate.
3. Where by the terms of the will the wife confessedly has the right to use the entire estate if necessary for her support, the court will not entertain a bill to determine whether she takes an estate for life or in fee, so long as she is in fact using the property merely for her support.
4. Costs were allowed the defendant who appealed.

Bill for the construction of a will. Heard upon bill and answer at the December term, 1891. Start, chancelor, decreed that the interest of the widow under the will was a life estate. Judith Johnson, the widow, appeals.

The will and codicil were as follows:

"1st. I hereby revoke and make void any will or wills heretofore made by me.

2d. After the payment of my just debts and funeral charges, I give and bequeath to my son, Samuel M. Johnson, the sum of two hundred dollars, and to each of my other children the sum of five hundred dollars.

3d. The balance of all my property, both real and personal, I devise and bequeath to my wife Judith, whom I hereby constitute and appoint the executrix of this my last will and testament, and I hereby authorize and empower her to sell and convey for such prices and at such times as may seem suitable to her in fee-simple, or for any less estate all or any part of the property thus

bequeathed to her, and to apply the proceeds thereof to her own sole and separate use and maintenance precisely as though it were her own property, and at her decease I direct that the remainder, if any, shall be distributed among my children now living or their heirs in equal parts."

CODICIL.

"I, Leonard Johnson, of Peacham, Caledonia county, State of Vermont, do make this my codicil hereby confirming my last will, made on the sixteenth day of October, in the year of our Lord one thousand eight hundred and sixty-six, so far as this codicil is consistent therewith, and do hereby change and revoke the second article of this will to read as follows:

After the payment of my just debts and funeral charges, I give and bequeath all of my property to my wife Judith; and that the said Samuel M. Johnson and the daughters therein mentioned are not to receive the sums mentioned nor any part thereof, only as described in the close of the third article of this will."

The orator alleged that he was the administrator of Leonard Johnson, the testator, with the will annexed; that the estate would amount after the payment of all charges to from $1,500 to $3,000; that doubt had arisen whether under the will and codicil the widow took a life estate or in fee, and prayed that the court would construe the will in that respect.

Ide & Quimby, for the orator.

The intention of the testator as gathered from the whole will and codicil was, to give the widow a life estate. *Smith* v. *Bell*, 6 Peters, 68; *Upwell* v. *Halsey*, 1 P. W. 651; *Henderson* v. *Blackbern*, 104 Ill. 227; *McCloskey* v. *Gleason*, 56 Vt. 264; *Stowell* v. *Hastings*, 59 Vt. 494; *Thrall et al*, v. *Spear et al.*, 63 Vt. 266; *Richardson* v. *Page*, 54 Vt. 373; Jarman Wills, chap. 15.

Costs should be paid out of the estate. *Exrs. of Judevine* v. *Judevine et al.*, 61 Vt. 597.

Bates & May, for Judith Johnson.

The opinion of the court was delivered by

ROWELL, J. The utmost of the case made by the bill is, that the orator, who is administrator with the will annexed, is in doubt whether the testator's widow takes an estate for life or in fee under the will, and he asks the court to advise him. It is not alleged that an occasion has arisen or is likely to arise that makes, or will make, it necessary for him to know how that is, assuming it to be doubtful. The widow is entitled to a life support at least. This cannot be questioned. She is, for aught that appears in the bill, to which alone we must look for the care made, content with this and claims no more. As long as this is so, that being the least right she takes, no other beneficiary is harmed. She may always be content with that, and the estate, which is small, may be wholly expended in her support, and then no one need ever know whether she took in fee or not. It is true, she says in her answer that she is entitled in fee; but this allegation is not an element in the case, as it is not in the bill.

The case, therefore, does not come within the jurisdiction of the Court of Chancery in the construction of wills as generally exercised in this country. The law of that subject is so fully discussed in *Morse* v. *Lyman*, *ante*, 167, that we refrain from discussing it here.

But there is another point, not much touched upon in that case, that is involved in this class of cases. In respect of the settlement of the estates of deceased persons, the jurisdiction of the Court of Chancery in this State is not original, nor concurrent with that of the Probate Court, but is special and limited, and only in aid of that of the Probate Court when its powers are inadequate. Further than that, the Court of Chancery has nothing to do with the settlement of such estates. It follows, therefore, that if at the time a question as to the construction of a will needs to be decided the Probate Court can be resorted to, and its jurisdiction is adequate for the purpose, that court must be resorted to and chancery cannot be. It may be that this point has not always

been kept in mind by our courts, but it is an inevitable deduction from our decisions.

Mrs. Johnson is the only defendant that appealed, and the decree is reversed. She is allowed costs. The other defendants seem to be at one with the orator, and they are denied costs.

Decree reversed and cause remanded, with directions that the bill be dismissed.

ROBERT A. STEVENSON *v.* HUGH GUNNING'S ESTATE.

When sustaining testimony admissible. Party cannot object to evidence on issue raised by himself. Tax inventories as evidence. Will of intestate not admissible. Immaterial issue. Presumption of innocence must be overcome by one alleging crime. Burden of proof. Expert witness in use of microscope.

1. When the testimony of a witness is attacked only by showing its improbability, and by other testimony conflicting with it, sustaining testimony that the witness bears a good reputation for truth and veracity is not admissible.

2. If one party has raised an issue by the introduction of evidence upon his side, he cannot afterwards object to the admission of evidence offered by his adversary upon the same issue for the reason that such issue is not strictly material.

3. One defence to the note was want of consideration. As tending to show where he obtained the money for which it was given, the plaintiff gave evidence that about 1859 he began to work for his father under an arrangement that he was to have $100 a year, and that in 1869 his father had accumulated a considerable sum which afterwards came to him. *Held*, the grand lists of the father and son for the year 1869, showing that neither the father nor son were taxed

for personal property, but upon the contrary claimed to be owing would be admissible, but, *quere*, without holding it reversible error, could the further fact that the plaintiff stood by without objection while the father gave in his inventory be shown, and did not the court give this testimony too much prominence by assuming that the inventories were then signed and sworn to as at present.

4. The maker of the note having deceased, it was error to receive in evidence his will, executed after the date of the note, and the statement of his affairs made to the one who drew the will at the time it was drawn.

5. The plaintiff could not properly testify in contradiction of the executor upon an immaterial matter drawn out by the plaintiff upon cross-examination, although transpiring subsequent to the decease of the intestate.

6. The defendant claimed that the note was a forgery and that the evidence in support of its execution was perjured. *Held*, that the jury should have been instructed that there was a legal presumption against the commission of both of these crimes, which the defendant must overcome.

7. *Held*, that there was no such state of the evidence in the case as called for a charge defining the relative force to be given positive as compared with negative testimony.

8. If the defence to a note be want of consideration, the plaintiff cannot by proof of the execution and delivery of the note cast upon the defendant the burden of making out this defence. The burden of proof is still upon the plaintiff to show a consideration, although the note itself would be an important piece of evidence to be weighed in his favor.

9. One who is an expert in the use of the microscope, but not in the matter of hand writing may tell the jury what he sees upon the examination of a written instrument with the microscope, but may not give an opinion as to whether a certain figure has been altered and how.

This was an appeal from the award of commissioners for the allowance of claims against the estate of Hugh Gunning. The action was assumpsit for the amount of a promissory note. Pleas, the general issue, statute of limitations and notice under the statute, denying the genuineness of the signature to the note.

Robert A. Stevenson *v.* Hugh Gunning's Estate.

Trial by jury at the June term, 1891, Munson, J., presiding. Verdict and judgment for the defendant. The plaintiff excepts.

The note was dated June 1st, 1886, for the sum of $4550, payable to the plaintiff or order. The evidence of the plaintiff tended to show that from 1859 he had lived with his father upon the home farm in the town of Barnet, and worked upon said farm under an arrangement that he was to receive $100 a year; that in 1868 his father had already accumulated a considerable sum of money and continued to so accumulate until 1879; that in 1879 his father and mother, there never having been any settlement with him for his work on the farm, deeded the farm to him and a sister, upon condition that they should maintain the father and mother for life; that at this time the father had accumulated, and had in the house, three $1000 bills and one $500 bill, of which he placed $2500, in one envelope and $1000 in another, saying, that when the plaintiff had performed the conditions of the deed, this money should belong to him; that the plaintiff's father died in 1879, his mother in 1889, and his sister in 1886, none of their estates ever having been settled in the Probate Court. The plaintiff's evidence further tended to show, that he went on under the deed and performed all its conditions, and that he had in 1886 accumulated the sum of $1,000 in addition to the $3,500 which his father had in 1879; that Hugh Gunning, the intestate, was well acquainted with the plaintiff and his family, and knew of these accumulations and that the plaintiff had this sum of money in the house; that in June, 1886, the said Gunning came to the plaintiff's house in the night time, apparently in great trouble, said that he had fallen into a trap and would have to go to the State's prison unless he could raise $5,000; that he had $450 and wished to borrow $4,550 from the plaintiff and did not want any one to know; that the plaintiff declined to let him have so large a sum without a witness, and told him to come again and he would see about it, and that he then and there wrote a note for $4,550 which he told Gunning

he should want him to sign if he had the money; that Gunning did come again in about one week with the note; that the plaintiff's brother and sister were both present when the plaintiff got the money, gave it to Gunning and took the note in question. The evidence of the defendant tended to show that in June, 1886, when said note was given, as claimed by the plaintiff, Gunning was at the house of one James Craig, in Peacham, and was not away from there long enough to go to the plaintiff's house at any time during that month; that Gunning had no occasion for so much money, and that if he had, he could have raised it without calling upon the plaintiff, since he owned $5,000 in United States Government bonds, which were at his disposal; and that the plaintiff did not have any such amount of money to loan Gunning, if he had needed it and called for it.

The brother and sister of the plaintiff were improved by him as witnesses. In reference to the testimony of the latter, the exceptions state, "The sister was cross-examined at great length and it was claimed by defendant that her story both upon direct and cross-examination was improbable and unworthy of belief, and it was claimed by the defendant and argued to the jury that the testimony of the plaintiff's brother and sister as to the giving of the note and delivering of the money, was false and perjured and that said note was a forgery. But no evidence was offered by the defendant, that the witness had made statements out of court different from her statements in court nor was any foundation undertaken to be made for such contradiction in her cross-examination, nor was any evidence introduced to discredit the witness except as testimony was introduced which tended to show that the facts were otherwise than as testified to by her."

The plaintiff offered to show in rebuttal that his sister bore a good reputation in the community where she had always lived for truth and veracity. This evidence was excluded by the Court under the plaintiff's exception.

Robert A. Stevenson *v.* Hugh Gunning's Estate.

The plaintiff in the opening of his case introduced evidence tending to show that his brother James had been long acquainted with Gunning and was on friendly terms with him, and that James supplied $50 of the money which was loaned Gunning, there in Gunning's presence. Against the objection and exception of the plaintiff the defendant was allowed to show that Gunning entertained ill feelings towards James from 1891 to the end of Gunning's life, and was allowed to show by various witnesses against the exception of the plaintiff, that Gunning at various times expressed feelings of hostility toward James, and that he did not treat him in a friendly manner.

The defendant was allowed against the exception of the plaintiff to put in the grand list of the town of Barnet for the years 1868 and 1869 and to prove by one Gilfillan that he was a lister in those years, took the list of the plaintiff and his father and that they did not give in any property but polls, and claimed to be in debt to the amount of their personal property. The said Gilfillan was further permitted to testify that the plaintiff was present when his father gave in his list and made no dissent from it.

The defendant was also permitted against the exception of the plaintiff to show by Geo. P. Blair, the executor named in the defendant's will, that he went to the house of Gunning at the time he drew the will and that Gunning then gave him general information as to the condition of his estate and property; and afterwards to introduce a certified copy of the said will.

Upon cross-examination of this witness the plaintiff enquired whether he, the plaintiff, claimed before the commissioners that most of his money came from his mother, to which the witness replied, that he did not so claim. Thereupon the plaintiff offered himself in rebuttal to show that he did make this claim before the commissioners.

The remaining facts sufficiently appear in the opinion.

W. P. Stafford and *Bates & May*, for the defendant.

The evidence as to the reputation of the plaintiff's sister was properly excluded. *State* v. *Roe*, 12 Vt. 93; *Paine* v. *Tilden*, 20 Vt. 554; *Sweet* v. *Sherman*, 21 Vt. 23; *Mosley* v. *Ins. Co.*, 55 Vt. 142; *Atwood* v. *Dearborn*, 1 Allen 483; s. c. 79 Am. Dec. 755; *Wright* v. *McKee*, 37 Vt. 161; *State* v. *Daley*, 53 Vt. 442; *State* v. *Emery*, 59 Vt. 84; Taylor's Ev. s. 1476; *People* v. *Gay*, 1 Park. Cr. Rep. 308.

Since the plaintiff himself raised the issue as to the state of feeling between his brother James and the intestate, he could not be allowed to object to evidence upon that point when offered by the defendant. *Knight* v. *Smith*, 57 Vt. 529; *State* v. *Ward*, 61 Vt. 153; *Palmer* v. *Cook*, 7 Gray 418; *Jones* v. *McLellan*, 76 Me 49; *Shailer* v. *Burnstead*, 99 Mass. 120; *Bartheleny* v. *People*, 2 Hill, 257, note (6); 1 Greenl. Ev. ss. 102, 107; *State* v. *Daley*, 53 Vt. 442.

The will of Gunning was properly admitted in evidence. *State* v. *Hopkins*, 50 Vt. 316; *State* v. *Daley*, 53 Vt. 442; *Perkins* v. *Blood*, 36 Vt. 273; *Noble* v. *Sylvester*, 42 Vt. 146; *Kimball* v. *Ladd*, 42 Vt. 747.

Doctor Hartshorn might properly testify as an expert in the use of the microscope. *Bridgeman* v. *Corey's Est.*, 62 Vt. 1; *Bierce* v. *Stocking*, 11 Gray 174; *Gossler* v. *Eagge & Co.*, 103 Mass. 331; *Sweet* v. *Shumway*, 102 Mass. 365; *Stone* v. *Hubbard*, 7 Cush. 595; *Quinsagamond, etc.* v. *Hobbs*, 7 Gray 250; *Com.* v. *Sturtevant*, 117 Mass. 122; s. c. 19 Am. Rep. 401 and note.

The charge of the Court as to the presumption of innocence was correct. *Weston* v. *Gravlin*, 49 Vt. 507.

Also as to the burden of proof in showing a consideration for the note. *Small* v. *Clewly*, 62 Me. 165; *Delano* v. *Bartlett*, 6 Cush. 364; *Nichols* v. *Munsel*, 115 Mass. 567; *Powers* v. *Russell*, 13 Pick. 69; *Burnham* v. *Allen*, 1 Gray 496; 1 Dan. Neg. Ins. s. 164.

J. P. Lamson, *Smith & Sloane*, and *Alexander Dunnett*, for the plaintiff.

Evidence of the good character of the plaintiff's sister for truth and veracity should have been admitted. *Mosely* v. *Ins. Co.*, 55 Vt. 142.

The testimony of Gilfillan was not a sufficient foundation for the admission of the grand lists of 1868 and 1869. *Brainard* v. *Buck*, 25 Vt. 573; *Hersey* v. *Burton*, 23 Vt. 685.

The statements of Gunning to Blair when he drew the will and the will itself, were declarations in favor of the intestate and inadmissible. *Wright v. Boston*, 126 Mass. 161; 2 Best Ev. 626; Smith's Leading Cas., 392; *Huse v. Preston*, 51 Vt. 245; *Gates* v. *Morse*, 51 Vt. 222; *Crump* v. *Starke*, 23 Ark. 131; *Higham* v. *Ridgway*, 10 East 109; *State* v. *Duncan*, 6 Ired. N. C. 236.

Hartshorn was not an expert in the matter of handwriting, and his opinion in that particular was inadmissible. *Johnson* v *Castle*, 63 Vt. 452; *Bridgeman* v. *Corey's Est.*, 62 Vt. 1; *Bemis* v. *Railroad*, 58 Vt. 636; *Wright* v. *Williams' Est.*, 47 Vt. 222; *State* v. *Ward*, 39 Vt. 225.

The Court should have instructed the jury as requested upon the presumption of innocence. Law. Pres. Ev. 27; 3 Stark. Ev. 1248; 1 Best Ev. 448; 1 Greenl. Ev. ss. 33 to 35; *Greensborough* v. *Underhill*, 12 Vt. 604; *Fire Association* v. *Bank*, 54 Vt. 657.

The charge of the Court as to the burden of proof was erroneous. *Bank of Troy* v. *Topping*, 13 Wend. 557; *Kinsman* v. *Birdsall*, 2 E. D. Smith 395; *Campbell* v. *McCormac*, 90 N. C. 491; *Bryne* v. *Grayson*, 15 La. An. 457; *Middelbury* v. *Case*, 6 Vt. 165; 1 Best Ev. 426, 589; 2 Greenl. Ev. 172; 3 Phil. Ev., marginal page 169, 131 and cases there cited; Sto. Pr. Notes, s. 7 and 181 and note; Rand. Com. Paper, ss. 562, 563, and cases cited; *Gerrish* v. *Bragg*, 55 Vt. 329; *Arnold* v. *Sprague*, 34 Vt. 402.

Robert A. Stevenson *v.* Hugh Gunning's Estate.

The opinion of the court was delivered by

ROSS, Ch. J. 1. The first contention is whether the County Court erred in excluding testimony offered in rebuttal, to show that the plaintiff's sister, who had been a material witness in his behalf, sustained a good reputation and character for truth and veracity. She had been cross-examined at great length, and it was claimed by the defendant that her story was improbable, and unworthy of belief, that it was false and perjured. The defendant did not claim that she had made statements out of court different from her statements in court, nor was any foundation attempted to be laid by the cross-examination for such contradiction, nor did defendant introduce any evidence to discredit the witness, except to show that the facts were otherwise than as testified to by her. On the statement of the position of the witness, we think, the Court properly excluded sustaining testimony in regard to her character for truth and veracity. The rule governing the introduction of sustaining testimony of this kind is stated as follows, in 3 Starkie on Ev. 1757: "And in all cases when the credit of a witness has been attacked whether by general evidence, or by particular questions on cross-examination, it seems that the party who called him is at liberty to support his testimony by general evidence of good character. So if the character of the attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general good character is admissible. But the mere contrariety between the testimonies of adverse witnesses, without any direct imputation of fraud on the part of either, supplies no ground for admitting general evidence as to character." To the same effect is the rule as stated by Mr. Greenleaf in his work on evidence, Vol. 1, s. 469. He says, "Where evidence of contradictory statements by a witness, or of other particular facts, as for example that he has been committed to the house of correction, is offered by way of impeaching his veracity, *his general character for truth* being thus in some sort,

put in issue, it has been deemed reasonable to admit general evidence, that he is a man of strict integrity, and scrupulous regard for truth * * * but mere contradiction among witnesses examined in court, supplies no ground for admitting general evidence as to character." The rule thus laid down is well supported by citation of decided cases. Our decisions are to the same effect. *State* v. *Roe*, 12 Vt. 93; *Paine* v. *Tilden*, 20 Vt. 554; *Sweet* v. *Sherman*, 21 Vt. 23; *Mosley* v. *Insurance Co.* 55 Vt. 142. There is no discussion of the principle governing the decision in *State* v. *Roe*. It is made to rest on an unreported case, then recently decided. But in *Paine* v. *Tilden*, this language is used: "Whenever the *character of a witness for truth* is attacked *in any way*, it is competent for the party calling him to give *general evidence* in support of the good character of the witness." It is observable that a distinction is taken between an attack upon *the character* of the witness as such *for credibility*, and the *character of the testimony*, *given for belief*. It is only when *the character of the witness for credibility is directly attacked*, by general evidence regarding his standing and character for truth and veracity, or by showing that he has made contradictory or inconsistent statements, either out of court, or in court, or that he has been convicted of some crime, or engaged in some act affecting his credibility like suborning or attempting to suborn a witness, or suppress testimony in the case on trial, that sustaining evidence can be used. But when the character of the testimony given by a witness is attacked only by showing its improbability, or by other testimony conflicting with the testimony of the witness, sustaining testimony cannot be admitted. If admitted, when there is only a conflict in the testimony of opposing witnesses, the opposing witnesses on both sides could be supported by sustaining testimony in regard to their standing and character, by reputation as witnesses, and the trial would be prolonged indefinitely. Besides the character of the testimony

given by a witness, does not directly attack the character of the witness for credibility. The distinction between an attack upon the character of the witness, and the character of his testimony, is recognized in *Sweet* v. *Sherman*, 21 Vt. 23. The plaintiff s character for credibility was attacked, and sustaining evidence was held properly admitted. The testimony of two of the defendant's witnesses was attacked by opposing testimony. The defendant offered testimony to sustain these witnesses by showing they bore a good character for truth and veracity, which was excluded against the defendant's exception. The court affirmed the judgment without alluding to this exception which was in the case and argued in the defendant's brief. The facts are not given on which the question arose in *Mosley* v. *Insurance Co.* Some of the language of the opinion, may be rather broad and unguarded, but it states the rule correctly, and claims to, and no doubt, the facts would show if given, does follow, *State* v. *Roe*, *Paine* v. *Tilden* and *Sweet* v. *Sherman*, *supra*. This exception is not sustained.

2. The plaintiff, to raise a probability that the intestate would be willing to apply to him secretly, for money in the presence of his brother James, introduced testimony to show that the intestate's and James' relations were friendly. Whether this testimony was strictly admissible or not, its introduction laid the foundation for receiving counter testimony from the defendant. Its reception would not be legal error of which the plaintiff could complain, he, having raised this issue, even if the issue was not strictly involved in the trial of the case. Nor do we observe anything inadmissible on this issue in the testimony of Mrs. Craig. If the plaintiff desired the particular acts or sayings of the parties which the witness testified indicated that ill feeling existed between them, the plaintiff could have called them out.

3. Moses Gilfillan was allowed against exception to testify in regard to the lists given in by plaintiff and his father in 1858 and 1869. The plaintiff's testimony tended to show that he be-

gan to work for his father some ten years before, on an understanding that he was to have one hundred dollars a year for his work, and that his father before 1868 had accumulated some of the money which the plaintiff claimed he loaned to the intestate in 1886. The plaintiff did not claim that he settled with his father, so that this money would become his at the death of his father and mother, until 1879, and that his father died that year, and his mother ten years later. This witness' testimony and the grand lists of the town, which were allowed to be put in against the exception of the plaintiff, tended to show that neither the plaintiff nor his father gave in any personal property, but claimed they were owing. The Court also allowed this witness to testify that the plaintiff, though present when the father gave in his list, did not deny his father's statements. This was before the taxpayer was required to make an inventory of his taxable property under oath. The Court in the charge treated these lists as made up from inventories returned by the plaintiff and his father. While the father's list, and what he said at that time might be received as bearing upon whether he had laid by money, as claimed by the plaintiff, and the plaintiff's list might be received as bearing upon whether his father owed him for work as he claimed, we do not think the plaintiff was under any duty to reply to, or correct, or contradict the statement of *his* father, in regard to his property to this lister, and that portion of this testimony was erroneously received, and that the Court gave the lists undue prominence by representing them as made from inventories made by the plaintiff and his father. We do not determine whether under the circumstances, these were material, reversible errors, inasmuch as we find such error in the next point.

4. We think it was error to receive the testimony of George P. Blair, and the will of the intestate. The force of this testimony was to show from the intestate's representations at the time the witness drew his will, and his declarations contained in

his will, that the intestate did not owe the debt sued for by the plaintiff. They were really declarations and entries made by the intestate in his own favor. By his death the plaintiff was rendered incompetent to testify to the transaction resulting in giving the note. It would give the intestate an unfair advantage, if his declarations and entries could be shown while the mouth of the plaintiff was closed by the death of the intestate. In legal effect, this testimony was not different from that held to have been erroneously received in *Godding, admr.* v. *Orcutt*, 44 Vt. 54. In that case, inventories of his property made yearly by the intestate and his entry on an execution in regard to what he had done with property bid off by him, both bearing upon issues involved, were held to have been erroneously received. In principle that decision controls this. The witness on cross examination, having denied that the plaintiff before the commissioners told witness that most of the money which went into the note came from his mother, the plaintiff was offered to dispute this denial and to show what he did say. The denial was called out by the plaintiff, and so far as shown by the exceptions was immaterial to any issue on trial. It is familiar doctrine, that a witness can not be impeached on immaterial matter. There was no error in the exclusion of the offered testimony.

5. Dr. Hartshorn was shown to be an expert in adjusting and using the microscope. He did not profess to have skill in examining hand writing, nor ink, nor change in the color of ink. He had examined the note, before it had become worn and before a thin paper had been pasted upon its back. Though not an expert, he could testify to what he saw when he made such examination. He was allowed against exception, to go further than describe what he saw when he made the examination, and to give his opinion that what appeared to be a figure six was when first made a figure one, and had since been changed to a six. This was giving his opinion on what he saw and described, as a matter of skill and expert knowledge on a subject on which

he did not claim to be skilled. The charge treats this as the opinion of an expert witness. The allowance of the opinion of this witness was error.

6. The plaintiff requested the court to charge the jury that in this case where the defence is forgery of the note in suit, there is a presumption of innocence of that crime which the defendant must overcome. He also requested the court to charge there was the same presumption of innocence of the crime of perjury. The defendant claimed and gave testimony tending to show that the note was a forgery, and that plaintiff's sister who testified to being present and knowing of the execution of the note, was guilty of perjury. The presumption of innocence arises in the trial of civil cases, whenever either the grounds of recovery or defence involve and charge the commission of a crime. *Greensborough* v. *Underhill*, 12 Vt. 604; *Bradish* v. *Bliss*, 35 Vt. 326; *Fire Association* v. *Bank*, 54 Vt. 657. It is a legal presumption, arising, not usually in the trial of civil cases, but in particular cases, dependent upon whether the grounds of recovery or defence involve the commission of a crime. Being a presumption of law properly arising in the case, it was the duty of the Court to have complied with the request. In *Fire Association* v. *Bank*, *supra*, such a request was made. It was applicable to the case. This court said, "The defendant was entitled to the charge called for by the request," but held that the request was complied with. The request was proper. It related to a question of law arising in the case. It was the duty of the Court to have charged on the subject unrequested, much more error to decline to charge on the subject when requested.

7. There is no statement of such facts as furnished a foundation for the request to charge with respect to the relative force to be given positive compared with negative testimony. The defence was not by the denial, or failure to remember, of a witness who was present when the note was executed, but rested upon testimony tending to show the note was never given. This

is not negative testimony within the rule. We discover no error in the charge with reference to reconciling the testimony of witnesses.

8. The plaintiff requested the Court to charge that if the jury find that the signature on the note is Hugh Gunning's, and that he signed it and gave it to the plaintiff, that makes a *prima facie* case for the plaintiff, and that in order for the jury to find for the defendant he must show by balance of evidence that the note is not due, the burden of proof is on him at that point, as the note imports consideration. The Court did not comply with this request but charged on this subject, "The burden is upon the plaintiff to snow that this note was signed by Hugh Gunning, and that he had the consideration for which the note purports to be given. If, however, you find that the note bears the genuine signature of Hugh Gunning, the note itself will then be an important piece of evidence to be weighed upon the plaintiff's side in determining the further question whether Gunning had the money. But the burden will still be upon the plaintiff to establish from all the evidence that the consideration of the note was paid." We do not think that the plaintiff was entitled to have his request complied with, and that the charge correctly stated the law of the subject applicable to this case. It is true when the plaintiff established that Hugh Gunning signed and delivered the note, the note of itself imported a consideration, and the plaintiff had made out a *prima facie* case, and was entitled to recover, if nothing further was shown. But when the defendant introduced testimony tending to shown want of consideration, the burden was still upon the plaintiff to establish that consideration was given by him for the note. While the plaintiff in the first instance, if nothing more was shown, lifted the burden resting on him by establishing the execution and delivery of the note, as a note, when the defendant introduced testimony tending to show want of consideration, the burden still was on the plaintiff to show consid-sideration, having weighed in his favor the *prima facie* import of

consideration, furnished by the note proved to have been duly signed and delivered. By telling the jury that if they found that the note itself bore the genuine signature of Hugh Gunning, the note would then be an important piece of evidence weighed on the plaintiff's side in determining whether Gunning had the money, the court gave the jury in effect the full force of the *prima facie* import of consideration, furnished by a duly executed and delivered deed.

This disposes of all the exceptions now insisted upon.

Judgment reversed, cause remanded.

GENERAL TERM, 1890,

TOWN OF BRIGHTON *v.* JAMES M. DOYLE AND OTHERS.

Mortgage of wife's real estate by deed absolute. Bond for re-conveyance to husband. Future advances. Possession as notice. Betterments. Amendment.

1. A husband and wife conveyed to R. by warranty deed, premises, of which the wife was the sole owner, to secure an indebtedness from the husband to R., and R. thereupon executed to the husband a bond conditioned to re-convey the premises to him upon payment of the indebtedness. *Held*, that the security would not cover future advances made to the husband alone.

2. The buildings having been insured in the name of R., but really for the benefit of the mortgagee, any insurance money must be applied by R. to the payment of the original indebtedness, and not of such further advances.

3. As a part of the original transaction and to secure the same indebtedness a bill of sale was given of certain personal property in which the wife claimed an interest, which was subsequently sold by R. *Held*, that in the absence of any specific directions the proceeds should be applied by him upon the original indebtedness.

4. Subsequently L., by procurement of the husband, paid R. the amount of his claim, including further advances, and took a conveyance from him of the premises. The husband and wife were still in possession. *Held*, that L. acquired no better title than R. had, and that the rights of the wife were not prejudiced by the fact that she requested him to help them, it not appearing that she knew of the future advances.

5. Still later L. obtained a decree of foreclosure against the husband alone for the entire amount paid by him to R. and this the orator bought in to protect itself. *Held*, that the orator thereby obtained no greater right against the wife than L. had.

6. The buildings upon the premises having become uninhabitable, the orator should be allowed the value of those which it erected with the approval of the wife and for her occupation.

7. And this sum may be allowed the orator in a foreclosure suit.

8. The orator should be allowed to amend its petition to adapt it to the relief to which it is entitled in accordance with these views.

Petition of foreclosure. Heard on the pleadings and a master's report at the September term, 1889, Essex County. Taft, Chancellor, decreed for the orator. The defendants appeal. The opinion states the case.

D. S. Storrs, for the orator.

The wife having stood by and seen these various transactions by her husband in reference to this property is estopped to set up an interest in it. *Cady* v. *Owen*, 34 Vt. 598; *Miller* v. *Bingham*, 29 Vt. 82; *Morgan* v. *Ry. Co.*, 96 U. S. 716; *Steele* v. *Smelting Co.*, 106 U. S. 447; *Continental Nat. Bank* v. *Nat. Bank of Commonwealth*, 50 N. Y. 575; *Blair* v. *Wait et al*, 69 N. Y. 113; *Bragg* v. *Boston & Worcester R. R. Co.*, 9 Allen 61; *Greene* v. *Smith*, 57 Vt. 268.

Bates & May, for the defendants.

A wife can only mortgage her real estate in the manner pointed out by statute; and this wife's realty can only be held to the extent she has so mortgaged it. R. L. ss. 1923, 1883, 1904, 1906; *Abell* v. *Lathrop*, 47 Vt. 375; *Dale* v. *Robinson*, 51 Vt. 20; *Rood* v. *Willey*, 58 Vt. 475; *Priest* v. *Cone*, 51 Vt. 495; Jones Mort. §548.

The possession of the wife was notice to Lang. *Presby* v. *Leitch*, 50 Vt. 239.

There is no estoppel. Big. Est. 443 *et seq.*; *Drury* v. *Foster*, 2 Wall. 24; *Stewart* v. *Babbs*, 22 N. E. Rep. 770; *Goodenough* v. *Fellows*, 53 Vt. 102.

The opinion of the court was delivered by

MUNSON, J. This is a petition to foreclose the defend-

ants' equity of redemption in the farm upon which they were living at the date of the petition; and it appears from the deed referred to in the petition that the farm so occupied consisted of two parcels of land, one containing one hundred and fifty-two acres, and the other thirty acres. No objection is made to a decree as to the thirty acres, and our view of the matter in controversy is such that a further statement concerning this piece is unnecessary.

On the sixth day of March, 1878, the defendant Rhoda A. Doyle, the wife of the defendant James M. Doyle, owned the one hundred and fifty-two acre piece, subject to a valid mortgage held by one Robinson, to whom there was also due from James M. Doyle a balance on account. On the day named the husband and wife gave Robinson a warranty deed of this land, and a bill of sale of certain personal property, as security for both debts, the total amount secured being $1,648.74. On the same day, and as a part of the same transaction, Robinson executed to James M. Doyle a bond for the conveyance of all the property to him upon the payment of this indebtedness.

After this transaction, Robinson continued to make advances to James M. Doyle. Meanwhile the buildings on the place burned, and the personal property above mentioned was sold, and Robinson received both the insurance money and the avails of the sale. It appears that Mrs. Doyle claimed an interest in the personal property, and that it was sold by consent of all concerned; but it does not appear that there was any understanding as to the indebtedness upon which it should be applied. Robinson made no distinction between the indebtedness of March, 1878, and his subsequent advances, and credited these receipts upon the general account.

The Doyles were dissatisfied with the situation, and had a talk with one Lang about taking up Robinson's claim; Mrs. Doyle remarking that she was willing to do anything to get out of his hands. The result was that Robinson, Lang and James

M. Doyle met on the fifteenth of March, 1880, to arrange the matter. Robinson then claimed a balance of $652, and Lang paid him that amount, and received from him a deed of the property. Lang took the title as security for the amount advanced, giving James M. Doyle an agreement to convey to him when the amount was paid. If the application of the insurance money and the amount received from the sale had been restricted to the indebtedness of March, 1878, there would have been due Robinson upon that indebtedness at this time only $39.16.

In March, 1883, Lang brought a foreclosure petition against James M. Doyle, and obtained a decree thereon; and soon after the equity of redemption expired, the orator, with a view to its own protection, paid Lang the amount of his decree and took a deed of the premises. While the title was so held, the old building in which the Doyles were living, and the shelter provided for the stock, became entirely unfit for use, and a house and barn, reasonably adapted to the requirements of the family and property, were built on the place by the town. When the title was taken, there was an understanding with the Doyles that they could have the premises upon paying the amount advanced to Lang; and after the house was erected, and the building of a barn decided upon, the selectmen executed to James M. Doyle an agreement to convey to him upon his paying the sum so advanced and the cost of improvements.

There was no change of possession or control in connection with any of these transfers; and Mrs. Doyle asserted no claim to the premises until the bringing of this petition. She knew in a general way of the transactions relating to the farm, but was not fully advised as to what was done, and was ignorant of her rights in the matter. It is not found that she assented to the making of further advances to her husband upon the security of this property. But the master reports that she was consulted in regard to the buildings, and consented to their erection. This pro-

ceeding is contested by Mrs. Doyle, and by her daughter as an attaching creditor of her interest.

Robinson held the title merely as security for an indebtedness, and if the bond for a re-conveyance had been executed to Mrs. Doyle, the transaction would have presented the ordinary case of a mortgage with the conveyance and defeasance in separate instruments. If no bond for a re-conveyance had been executed by Robinson, the transaction would have differed only in that the defeasance would have rested in parol, and Mrs. Doyle would have been entitled to a re-conveyance upon payment of the debt secured. But a bond for the conveyance of the property having been executed to the husband, and further advances having been made to him by the holder of the title, it is necessary to consider whether Mrs. Doyle has thereby lost the right to redeem the property by paying the amount which her deed was given to secure.

The deed of the husband and wife was effectual to pass the title for any purpose; and if one object of the conveyance was to effect a transfer of the property to the husband, the bond would have been a proper step in that direction, and would ultimately have entitled the husband to the deed instead of the wife. In equity, the husband would then have been, by virtue of the bond, the present owner of whatever there was in the property above the security; and the interest of the wife would have been confined to her homestead right in the equitable estate of her husband. But there is no finding that the purpose of the conveyance extended to this, nor that any of the parties so understood it. On the contrary, the report finds, not only that the deed was given as security, but that Robinson took it instead of a mortgage "to save the expense of foreclosure if the debt was not paid as agreed." This seems wholly to exclude the idea that the deed was intended to accomplish an unconditional transfer of the property to the husband.

The bond executed to Doyle was for the conveyance of the

property to him upon his paying the amount for which Robinson received the title as security. As against Robinson, he could acquire the title only by fulfilling the conditions of the bond. We think he had no greater right as against Mrs. Doyle. He acquired no interest by virtue of the bond that did not depend upon a compliance with its conditions. The bond did not make him the owner of the property subject to the mortgage lien, but secured him a right to become the owner by redemption. We think a right to redeem the property upon Doyle's failure to do so remained in the wife. So Robinson remained liable to Mrs. Doyle for a re-conveyance upon Doyle's failure to make the payment required by the bond.

Knowledge on the part of Mrs. Doyle that further credits were being given to her husband did not make them a charge upon the property. The mortgage continued to be held by Robinson as security only for the original indebtedness. It is evident that the insurance on the buildings was in Robinson's name, and that the loss was paid directly to him. In collecting the insurance money he received it upon the indebtedness for which the property was mortgaged, and it should have been so applied. Nothing appears to authorize his application of the avails of the sale of personal property upon any other indebtedness than that for which the property sold was holden. Under the circumstances, no express directions were needed to confine the application of these sums to the mortgage debt. When the payments are thus applied, the secured indebtedness, at the time of the transfer to Lang, is found to have been only $39.16. But Lang paid Robinson $652, and to determine the status of the excess it is necessary to consider the circumstances under which he made the payment.

The record would disclose to Lang that the property conveyed to Robinson had belonged to Mrs. Doyle. If he knew this, he would know that the property was still in the possession of the one from whom the title came. So he must be treated as

having known that Robinson's title was derived from Mrs. Doyle, and as chargeable, by reason of her continued possession, with such information as would have been obtained by inquiring of her. On such inquiry he would have learned that the deed to Robinson was given merely as security, that a part of the indebtedness had been satisfied by an application of the avails of portions of the mortgaged property, and that upon paying the balance she would be entitled to a re-conveyance. The bond contained nothing that could excuse Lang from applying for and acting upon this information.

Nor do we think the conversation Lang had with Mrs. Doyle, before his meeting with Robinson and Doyle, was such as to excuse him from making further inquiry of her in connection with the transaction. It is true that she then expressed an anxiety to have Lang take up the claim, and said she was willing to do anything to get out of Robinson's hands. But there is nothing to indicate that she had any definite knowledge of the condition of affairs between Robinson and her husband, nor that the conversation was such as to lead Lang to suppose that she had. Under these circumstances it is not necessary to treat this remark as an effectual waiver of her rights, or as giving her husband authority to effect a settlement with Robinson by including in the accounting debts for which the property was not holden.

When Lang met with Robinson and Doyle, he knew from the account presented by Robinson that a considerable part of it had accrued since the giving of the security; and there was nothing in the bond held by Doyle to lead him to suppose that Robinson took the title as security for future advances. He was chargeable with knowledge that Mrs. Doyle was the owner of the property, subject only to such incumbrance as she had placed upon it. The security could not be extended without her consent; and when charges were presented in addition to the original indebtedness,it was Lang's duty to inquire of her before paying

them. In taking his deed from Robinson he obtained security for only such part of his investment as went to take up the unpaid balance of the indebtedness of March, 1878.

The decree obtained by Lang, and purchased by the orator, having been against James M. Doyle alone, the title received by the orator is, as against Mrs. Doyle, the same as that held by Lang.

This leaves for consideration the claim of the orator growing out of the improvements made upon the farm. The buildings were erected in good faith, and with the knowledge and assent of Mrs. Doyle, and were necessary to her continued occupancy of the premises as a homestead. The town took the title, and held and improved the premises, in the expectation that the family would have whatever there was in the property above the amount of the decree and the cost of improvements. It is true the town understood that in the event of a conveyance the title should go to the husband, and that in entering into an agreement to convey upon receiving payment it dealt only with him; but it asked for and acted in accordance with the expressed wish of the wife as well as that of the husband in making the improvements. Everything was done in this particular that makes for the protection of the town that would have been done if the state of the title had been correctly understood.

The orator, believing itself to have derived an absolute title from Mrs. Doyle, but having in fact only a mortgagee's interest after condition broken, suffered the grantor of its title, its mortgagor in fact, to remain in possession of the property and enjoy the rents and profits. During this continued occupancy of the mortgagor, the orator came upon the premises, with the approval of the mortagor, and erected the buildings. The town's right to compensation for these improvements, in a suit proper for the allowance of a claim of that character, must be at least equal to the right of a mortgagee in possession. It is evident that if Mrs. Doyle were out of possession and seeking to redeem, she

would not be allowed to do so without accounting to the town for the value of the improvements. Shall she be allowed to redeem on the orator's petition without doing the same?

The rule that "he who seeks equity must do equity" is ordinarily applied against a party plaintiff. The books would seem at first view to require that its application be thus restricted. But Mr. Pomeroy, in discussing this subject in his work on Equity Jurisprudence, usually employs the word "actor" to indicate the person against whom the rule may be invoked; and this term may have been chosen as sufficiently broad to include one who relies upon the protection of an equitable doctrine, although in name a defendant. Indeed, it is plain from section 85 of this work that the author considers that one who stands in the position of a defendant may sometimes be within the scope of the word.

The mortgagor's interest after condition broken is a right to redeem. This right, unless by statutory provision, is recognized only in equity. The mortgagee may take possession by virtue of his legal title, and the mortgagor will then be entitled to redeem at his pleasure. But the mortgagee may, by the process of forcelosure, compel the mortgagor to exercise his right to redeem within a reasonable time. The mortgagee is then the moving party; but he moves for the purpose of forcing the mortgagor to assert his equitable right or abandon it. The mortgagor, although party defendant, is the one who requires the protection of equity. We think he should not be permitted to avail himself of his equitable title in foreclosure proceedings without doing that equity which would be required of him as plaintiff in a suit for redemption. As regards his original obligations the amount required of him would be the same in one case as in the other. We see no reason why the value of permanent improvements should be equitably accounted for in one case and inequitably retained in the other. The one whose expenditures for improvements are at stake will ordinarily be in possession of the

premises, and the party defendant in a bill to redeem. But it would be strange if a party out of possession, who had erected buildings under the peculiar circumstances of this case, could not proceed in equity to foreclose the party benefited without abandoning a perfectly equitable claim for improvements.

Following these views, Mrs. Doyle will not be permitted to retain the improved property by paying the amount of the mortgage debt, but must allow the orator in addition the sum of $500, which the master reports as the enhanced value of her estate. As the lot from which the lumber for the barn was taken is left out of the accounting, we do not deduct the value of the lumber from the above sum. For the purpose of determining the interest this sum is apportioned to the actual cost of the respective buildings.

The substance of the bill is such as to show that the orator is entitled to relief in accordance with the holding of this opinion, and leave should be given the orator to so amend the statements and prayer of its bill as to make them applicable to the defendant Rhoda A. in the view indicated.

Decree reversed and cause remanded with mandate.

Munson, J., doubts as to the effect that should be given to the bond.

LEWIS AND LEACH ASSIGNEES *v.* BURLINGTON SAVINGS BANK.

Insolvency. When conveyance can be recovered as preference. Contemplation of insolvency. May recover value of mortgage. Interest. Construction of report.

1. In a suit by an assignee in insolvency to recover the value of a payment made within four months, a finding by a referee that a debtor was insolvent at the time of the payment, in the sense that his liabilities exceeded his assests, that the debtor intended a preference, and that the payment was received by the defendant having reasonable cause to believe that the debtor was insolvent in the above sense, necessarily imports the further fact that the defendant had reasonable cause to believe that the payment was made in fraud of the insolvent law, and entitles the plaintiff to a recovery.
2. And "contemplation of insolvency" of that kind is the same thing in this respect as actual insolvency.
3. The creditor gave to the defendant a mortgage as a part of the fraudulent preference, and the defendant afterwards and before the bringing of this suit sold the mortgage note for its full face value. *Held*, that the plaintiffs could recover of the defendant the amount received from the sale of this note, but not the value of the mortgaged premises.
4. It not appearing that the plaintiffs made any demand on the defendant before the commencement of suit, interest should be computed from the date of service.
5. *Held*, that the evidence as reported by the referee, supported his findings that the creditor was insolvent, that he made the payment intending a preference, and that the defendant received it having reasonable cause to believe that the creditor was insolvent or in contemplation of insolvency.

Assumpsit by the plaintiffs, as assignees in insolvency of Albert Sowles, to recover the value of certain preferences paid the defendant by said Sowles, within four months of the filing of the petition in insolvency. Heard at the September term, 1889,

Franklin county, Tyler J., presiding, upon the report of a referee. Judgment *pro forma* for the plaintiffs to recover the amount of the cash payments and the value of the mortgaged premises. The defendant excepts.

In April, 1882, the defendant loaned $5,000 to Wilbur P. Davis, J. R. Armington, Edward A. Smith, and Albert Sowles, the insolvent, for which it took their joint and several promissory note, on three months time. This note was renewed from time to time, the last renewal being dated October 22, 1883.

From the time the loan was made until the time of said last renewal, the officers of the defendant bank had no particular knowledge as to the amount or situation of the property of any of the signers. Davis had been for many years clerk of the Franklin County Court, and was reputed to be solvent. Very little importance was attached to the liability of Armington and Smith. Sowles was, and had been for many years, cashier of the First National Bank of St. Albans, and was reputed to be one of the wealthy men of Franklin county.

The application for renewal, October 22, 1883, was addressed to the treasurer of the defendant and was approved by one of its investment committee. Subsequently it came before the full board and it was then suggested by some one that the signers of this note were engaged in stock speculations in the New York market. Thereupon it was voted that this last renewal should be approved, but that upon its maturity, the note must be paid or secured by mortgage.

On the 12th and 14th of January, 1884, there was a run on the First National Bank of St. Albans, and some $50,000 or $60,000 in deposits were drawn out Shortly after it was given out that the bank had been examined and found sound and was going on with its business, and the bank examiner publicly announced that the institution was solvent. The officers of the defendant knew of the run and understood that it had been successfuly met.

January 25, 1884, Davis wrote to the defendant's treasurer enclosing a new note and a draft for three months' interest. In reply to this, the defendant's treasurer returned the note and draft, stating that the trustees declined to renew the note and that the old note must be paid at once. This action was taken in accordance with the vote of the investment committee, previously referred to. January 30, 1884, the matter came before the investment committee and it was then decided that the note must be paid at once or satisfactory security given, and the defendant's treasurer so notified Davis on the same day. February 6, Davis wrote the treasurer of the defendant that one of the signers of the note was out of town, and that upon his return satisfactory arrangements would at once be made.

In taking the aforesaid action in reference to this note, the investment committee acted merely upon their information that the signers were engaged in stock speculations and without information as to the particulars or results of those speculations.

In the latter part of February, 1884, the matter of this note was put into the hands of William G. Shaw, a member of the investment committee and an attorney, who thenceforth acted for the defendant in the matter. February 29, Shaw went to St. Albans to get payment of the note, and it was arranged that the parties interested should meet. Pursuant to this appointment he met the signers of the note at the rooms of Davis in the Welden House and requested them to pay the same. They were not prepared to do so. Armington and Smith claimed to be unable to contribute anything towards the sum due. Davis was willing to pay one-half the debt, provided Sowles would pay the other half, and it was finally agreed that $1,000 in cash should be paid at that time, $500 by Davis and $500 by Sowles, and that another meeting should be held March 5th to arrange about the balance. Thereupon Davis and Sowles each gave their check for $500 payable on the First National Bank of St. Albans. These checks were properly certified by that bank, and Shaw

thereupon agreed to hold them until the subsequent meeting of March 5th, when the payment of the note was to be completed.

March 5th, Shaw again went to St. Albans. The checks were then cashed, and it was arranged that Sowles and Davis should each take care of one-half of the balance remaining due on said note. Sowles proposed to mortgage real estate in St. Albans on Main St. and certain other real estate on Newton St., in the same village. For the purpose of investigating the title to this real estate, Shaw went to the town clerk's office in St. Albans. In making such examination he found the record of a mortgage of other property in St. Albans from Sowles to the First National Bank, dated January 17, 1884, and examined such record so far and only so far as to ascertain that it did not cover the property mentioned by Sowles on Main St. and Newton St.

March 11th, Shaw again went to St. Albans, having been necessarily detained in the meantime, and Davis then arranged by cash payment and satisfactory mortgage security for his half of the balance due on the note. Sowles gave Shaw his note for $1,600, secured by mortgage on the Main St. and Newton St. property, paid him $162.27 in cash and passed over a check for $250, drawn by Armington, one of the signers of the note. Thereupon the $5,000 note was surrendered as paid.

While the indebtedness represented by the $5,000 note and its renewals existed, Albert Sowles was reputed to be a wealthy man, and such reputation was known to the officers of the defendant, and none of them had reason to believe that he was not financially responsible, except so far as the facts above state should have put them upon inquiry.

In point of fact, Sowles had been insolvent for some time before the maturity of the note, in January, 1884, owing more than $140,000, while his assets were from $50,000 to $70,000. Some $25,000 of these assets were in real estate in St. Albans, Alburgh, and Swanton, and all of this, except that mortgaged to

the defendant as above, had been mortgaged to the First National Bank of St. Albans, and the mortgages deposited in the town clerks' offices as early as February 16, 1884.

After stating the foregoing facts in substance, the referee reported as follows:

"I find, if I may so find from the facts hereinbefore stated, consistently with their legal effect, and in such case only, that the part payment of $500, made by Albert Sowles to the defendant by his check given February 29, 1884, and cashed on March 5th following, was not made in the usual course of business or in the usual course of making payments; that the circumstances under which it was made put the defendant on inquiry as to said Sowles' insolvency; that it was made by said Sowles while insolvent with a view to give a preference, and that the defendant received it having reasonable cause to believe said Sowles to be insolvent or in contemplation of insolvency; and that the cash payment of $168.27 and the conveyance in mortgage made by said Albert Sowles March 11, 1884, were made under circumstances which put the defendant on inquiry as to said Sowles' solvency; that they were made by said Sowles while insolvent and with a view to give a preference, and that the defendant received them having reasonable cause to believe said Sowles to be insolvent or in contemplation of insolvency."

The referee found that the value of the premises mortgaged to the defendant as above, at the time the mortgage was executed, was $2,000.

William G. Shaw and *Albert P. Cross, for the defendant.*

Whether one is put upon inquiry by a certain state of facts, is a question of law and not of fact. The finding of the referee in that respect is not conclusive unless the facts reported by him warrant it as matter of law. In this case they did not. *Read* v. *Moody*, 60 Vt. 668; *Bromley* v. *Hawley*, 60 Vt. 46.

The effect of putting one upon inquiry is limited to such facts as he could have ascertained by reasonable inquiry. *Blaisdell* v. *Stevens*, 16 Vt. 186, 187; *Stafford* v. *Ballou*, 17 Vt. 329; *Adams* v. *Sowles*, 33 Vt. 538; *McDaniels* v *Flowerbrook Manufacturing Co.*, 22 Vt. 274; *Passumpsic Savings*

Bank v. *National Bank*, 53 Vt. 82; *Hill* v. *Murray*, 56 Vt. 177; *Lovejoy* v. *Raymond*, 58 Vt. 509.

The court will not infer one fact from another fact found by a referee. *Hammond* v. *Smith*, 17 Vt. 231; *Richmond* v. *Aiken*, 25 Vt. 324.

The amount recovered in this case cannot exceed the value of the mortgage note given to the defendant. *Cook* v. *Whipple*, 9 B. R. 155; Bump Bank. 8th Ed., 811.

Wilson & Hall, *Farrington & Post*, and *H. A. Burt*, for the plaintiff.

The facts reported by the referee not only tend to support his finding upon every point necessary to the plaintiff's right of recovery, but show that his findings were the only possible ones under the circumstances. *Denny* v. *Dana*, 2 Cush. 160; R. L. s. 1861; *Larkin* v. *Hapgood*, 56 Vt. 597; *Read* v. *Moody*, 60 Vt. 668; Bump Bankr., 829 to 834 inclusive; *Toof* v. *Martin*, 13 Wall. 40; *Buchanan* v. *Smith*, 16 Wall. 277; *Wager* v. *Hall*, 16 Wall. 584; *Walburn* v. *Babbit*, 16 Wall. 577; *Forbes* v. *Howe*, 102 Mass. 427; *Alden* v. *Marsh*, 97 Mass. 160; *Buffum* v. *Jones*, 3 N. E. R. 718; *Mathew* v. *Riggs*, 5 N. E. R. 863; *Graham* v. *Stark & Savage*, 3 B. K. Reg. 357; *Scammon* v. *Cole*, 3 Cliff. 472; *Kingman* v. *Terrill*, 11 Allen 97; *Merchants' Nat. Bank* v. *Cook*, 95 U. S. 342.

The knowledge of Shaw, its attorney, was the knowledge of the defendant. *Bush* v. *Moore*, 133 Mass. 198; *Sartwell* v. *North*, 4 N. E. R. 51; *Mathew* v. *Riggs*, 5 N. E. R. 863.

The opinion of the court was delivered by

MUNSON J. This suit is brought by the assignees of the estate of Albert Sowles, an insolvent debtor, to recover certain sums paid, and the value of certain real estate conveyed, by said debtor to the defendant, within four months of the filing of the petition in insolvency. After giving the history of the indebtedness, and fully reporting the circumstances under which the pay-

ments and conveyances were made, the referee presents further findings as made by him, if he may so find from the facts before reported, consistently with their legal effect.

In this manner the referee finds as to the payment of five hundred dollars, that it "was not made in the usual course of business or in the usual course of making payments, that the circumstances under which it was made put the defendant on inquiry as to said Sowles' solvency, that it was made by said Sowles while insolvent with a view to a preference, and that the defendant received it having reasonable cause to believe said Sowles to be insolvent or in contemplation of insolvency."

The argument of the defendant with reference to this payment is based upon a construction of the clause above quoted which makes all the findings subsequent to the first one, conclusions drawn from the first. Assuming that everything rests upon the finding that the payment was not made in the usual course of business, the defendant contends that this finding is not justified by the facts reported; and insists further that even if the finding can be sustained, it cannot support the subsequent findings, or affect the legal nature of the transaction; for the reason, as asserted by the defendant, that the provision making a departure from the usual course of business *prima facia* evidence of fraud applies only to the transactions which come under the section in which the provision is found.

We see nothing in the clause quoted from the referee's report to justify the construction given it by the defendant. It is evident that the findings subsequent to the first are not deductions from the prior finding, but that each conclusion is an independent finding from the facts previously stated. If the finding that the payment was not in the usual course of business be rejected, there will remain the findings that the payment was made by the debtor while insolvent with a view to give a preference, and that the defendant received it having reasonable cause to believe the debtor insolvent or in contemplation of insolvency.

These are conclusions of fact, and the only question for the court is whether the circumstances reported by the referee tend to establish them. It is very clear that they do. It appears then that the debtor was insolvent at the time of the payment, that a preference was intended by the debtor, and that the creditor had reasonable cause to believe the debtor insolvent or in contemplation of insolvency. If these findings are sufficient to support a recovery, without an express finding that the creditor had reasonable cause to believe that the payment was made in fraud of the laws relating to insolvency, it is unnecessary to consider whether the payment was out of the usual course of business, or whether the provision making that fact *prima facie* evidence of fraud is applicable to such a payment.

As to the second cash payment and the conveyance in mortgage, the referee finds, with the proviso above stated, that they "were made under circumstances which put the defendant on inquiry as to said Sowles' insolvency, that they were made by said Sowles while insolvent and with a view to give a preference, and that the defendant received them having reasonable cause to believe said Sowles to be insolvent or in contemplation of insolvency."

The defendant claims as to both causes quoted from the report that the finding that the defendant was put upon inquiry is the basis of the subsequent findings; that such finding is not justified by the facts reported, and cannot be sustained; that in any event the finding cannot affect the question at issue in the absence of a further finding that the defendant would have ascertained the fact of insolvency upon inquiry. The view of the court as to the character of these findings is indicated above. The finding that the defendant had reasonable cause to believe the debtor insolvent or in contemplation of insolvency is not dependent upon the finding that defendant was put upon inquiry, but is a conclusion drawn directly from the facts previously stated. The finding that the defendant had reasonable cause to believe the debtor insolvent or in contemplation of insolvency

reaches beyond and renders inapplicable the questions raised by the defendant as to the duty of inquiry.

The report so construed presents distinct and positive findings, that Sowles was insolvent when the payments and conveyance in question were made, that such payments and conveyance were made with a view to give a preference, and that the defendant when receiving them had reasonable cause to believe that Sowles was insolvent or in contemplation of insolvency. But the plaintiffs are not entitled to recover unless the defendant had also reasonable cause to believe that the payments and conveyance were made in fraud of the insolvent law. The referee has not found this fact, unless it is covered by the findings above stated in their application to the case presented. It has been repeatedly held that a referee's report cannot be aided by inferring facts from the facts reported; and we cannot sustain a judgment for the plaintiffs on this report unless the fact not specifically stated is included in the findings made.

The first cash payment was the result of a demand for full satisfaction, and was taken in connection with an understanding that another meeting of the parties should be had at once, and that the balance should then be provided for. The proposed meeting occurred after a short delay, and the balance was then covered by the second cash payment and the conveyance in mortgage, and the note was thereupon given up as paid. These matters were all parts of one transaction, in which the purpose of the defendant throughout was to secure full satisfaction of its claim. So no distinction need be made between the two payments, in considering whether it sufficiently appears from the report that payment was received with reasonable cause to believe that it was made in fraud of the law.

The referee reports that Sowles had been insolvent for some time, owing debts amounting to more than twice the value of his assets. The questions presented for the determination of the court are not submitted in connection with any findings as to the business of the debtor, or the usual course of making pay-

ments as depending upon the usages of his business. There is nothing to indicate that in submitting his report the referee had in mind any other condition of insolvency than the one above stated, nor that his findings were presented in any other view. We consider, therefore, that the findings in question are to be construed as having reference to that condition of insolvency which is established by the report.

Then we have presented for consideration the question whether in the case of one who has received full payment of his demand, a finding that he had reasonable cause to believe the debtor insolvent in the ordinary sense, necessarily involves the fact that he had reasonable cause to believe that the payment was made in fraud of the insolvent law. It is evident that payment in full from one who has not the means to pay all his creditors in full must necessarily, in the event of insolvency proceedings, prevent that equal distribution of his assets which it is the object of the insolvent law to secure. Such a payment is, therefore, a payment in fraud of the law. It seems clearly to follow that when the payment received is payment in full, and the one receiving it has reasonable cause to believe that the payor is insolvent in the sense indicated, he has reasonable cause to believe that such payment is made in fraud of the law. The first two facts necessarily include the third.

But the defendant is found, in the words of the statute, to have had reasonable cause to believe the debtor "insolvent or in contemplation of insolvency." In view of this alternative finding, the question of the sufficiency of the facts reported must be considered as if there were no other finding than that the creditor had reasonable cause to believe that the debtor was in contemplation of insolvency. But we think no different conclusion can be reached when the question is thus considered. As before indicated, the findings are to be treated as referring to that condition of insolvency which the report discloses. It thus appears that the defendant, in receiving full satisfaction of its

demand, had reasonable cause to believe that the debtor was then contemplating a condition of insolvency in which payment in full to one would necessarily be at the expense of others; and such a payment could not be a payment in fraud of the law.

So the report is held to embrace all the findings necessary to enable the assignees to recover payments made and the value of property conveyed within four months before the filing of the petition. No further question arises regarding the two payments.

After petition, but before the adjudication of insolvency, the defendant sold the mortgage for its face value to one Merritt Sowles, who still holds it. The claim of the plaintiffs that they can recover in addition to the cash payments the full value of the premises mortgaged, cannot be sustained. If a recovery is to be had upon the mortgage transaction as for the value of property conveyed, the property of which the insolvent divested himself by the conveyance in mortgage will be determined by the amount which would be required to free the title from the incumbrance. If the mortgage were valid as against insolvency proceedings, the title would be in the assignees subject to the mortgage lien, and they could protect their interest in the property by paying the mortgage indebtedness. It is evident that the insolvent's deed did not take from the estate anything of greater amount than the debt secured. So the assignees cannot be permitted to recover more than the amount of the incumbrance, if they may recover on account of the mortgage in this proceeding. The law is designed merely to undo the transaction.

But the defendant insists that if the mortgage is void nothing passed by it; and that consequently the estate is without injury except from the cloud upon its title, and can have no other remedy than a proceeding to set aside the conveyance. The provision that certain transactions shall be void was made for the benefit of creditors, and must be construed as making such transactions voidable at the election of the assignee. But in treating

a preference as void, an assignee may either avoid the conveyance and retake the property, or suffer the conveyance to stand and recover the value of the property conveyed. The assignees are no more restricted to proceedings to set aside this mortgage than they would be restricted to a pursuit of the specific property in the case of an unlawful receipt and disposition of goods. The defendant having realized upon the mortgage security, we see no ground upon which it can contest the plaintiffs' right to recover the value of the mortgage interest as ascertained by its sale. We think the money received by the defendant on account of the mortgage stands the same as if received directly from the insolvent, and may be recovered by the assignees in this action.

It remains to determine the date from which interest should be allowed. As between Albert Sowles and the defendant, the payments were properly made and the mortgage valid. They were void only as against proceedings in insolvency, and upon being so treated by the assignees. Some action in disaffirmance of the transaction was necessary to charge the defendant with the payment of interest. As no date of an earlier demand is shown, the bringing of the suit is the only demand from which computation can be made. Interest is therefore allowed from the day of service.

Judgment reversed, and judgment for plaintiffs for $2,368, and interest thereon from March 12, 1887.

TOWN OF VERSHIRE *v.* TOWN OF HYDE PARK.

Pauper. Suit pending at passage of act of 1886. Transient pauper. Insane person.

1. Under the pauper law of 1886 the liability of towns for the support of paupers depends upon residence and the question of settlement is immaterial.

2. An order had been made removing the pauper from the plaintiff town, and from this order an appeal had been taken which was pending at the time of the passage of the act of 1886. The pauper had not been actually removed but continued to reside in the plaintiff town, and never resided in the defendant town. The support sued for was subsequent to July 6, 1888. *Held*, that the affirmance of the order of removal by the County Court did not make the defendant liable.

3. The support sued for was furnished the unemancipated insane daughter of R., who was the pauper removed by the order above referred to. *Held*, that this did not alter the case, for, (a) being unemancipated, she was a member of her father's family and subject to the order of removal, and (b) if not subject to that order, and a transient pauper, still she had never resided in the defendant town, and hence that town was not liable.

Action to recover for the support of a pauper. Heard at the December term, 1889, Orange county, Tyler, J., presiding, upon an agreed statement of facts. Judgment for the defendant. The plaintiff excepts.

J. K. Darling, for the plaintiff.

Previous to the act of 1886, the adjudication upon the order of removal would have conclusively fixed upon the defendant the liability to support this pauper. *Langrove* v. *Pawlet*, 20 Vt. 309; *Chester* v. *Wheelock*, 28 Vt. 554; *Windham* v. *Chester*, 45 Vt. 459; *Dorset* v. *Manchester*, 3 Vt. 370; *Barre* v. *Morristown*, 4 Vt. 574; *Rupert* v. *Sandgate*, 10 Vt. 278; *Hartland* v. *Williamstown*, 1 Aiken, 241; *Hale* v. *Turner*, 29 Vt. 350;

Poultney v. *Sandgate*, 35 Vt. 146; *Cabot* v. *Washington*, 41 Vt. 168; *Stowe* v. *Brookfield*, 26 Vt. 524.

That act in terms provides that it shall not effect pending suits. No. 42, Acts 1886, s.14.

P. K. Gleed, for the defendant.

The pauper did reside in the plaintiff town and did not reside in the defendant town. Hence the former is and the latter is not liable for her support. *New Haven* v. *Middlebury*, 63 Vt. 399; No. 42, Acts of 1886; *Worcester* v. *East Montpelier*, 61 Vt. 139; *Chittenden* v. *Barnard*, 61 Vt. 145.

The opinion of the court was delivered by

START, J. It appears from the agreed case, that the pauper for whose maintenance the plaintiff town claims the defendant town is chargeable, is the unemancipated daughter of Darius H. Rowell; and that on the 12th day of October, 1886, it was adjudged by a court of inquiry that said Rowell had come to the plaintiff town to reside, that his legal settlement was in the defendant town, and he was ordered to remove with his family to the defendant town. From this order, the defendant appealed to the December term, 1886, of the Orange County Court, and it was there adjudged that said Rowell was duly removed. Said Rowell continued to reside in the plaintiff town, maintaining himself and family, until July 6, 1888, when he took the pauper in question to the dwelling house of the overseer of the poor of the plaintiff town; and the plaintiff has ever since provided for her. It does not appear that the pauper, or her father, ever resided in the defendant town, but it does appear that the defendant town is not the town where they last resided for three years.

Since the passage of No. 42 of the Acts of 1886, towns have not been liable for the maintenance of paupers by reason of a legal settlement therein. *Worcester* v. *East Montpelier*, 61 Vt. 139; *Chittenden* v. *Barnard*, 61 Vt. 145. By this act, the right of one town to maintain an action against another town for

expense incurred in the support of paupers, is made to depend upon the *residence* and not upon the settlement of the pauper. If a person comes to want in the town where he *resides*, such town must provide for him, and, in such case, the town is without remedy as against any other town. But if a person is temporarily away from the town where he *resides* and comes to want, and is provided for by the town where he so comes to want, he is a "transient pauper," and the town so providing for him, by giving the notice required by the statute, may recover the expense incurred in his support, of the town where he last resided for three years, maintaining himself and family. In this case, it appears that the defendant town is not the town where the pauper so resided, and, for this reason, the plaintiff cannot recover under the act of 1886. *New Haven* v. *Middlebury*, 63 Vt. 399; *Chittenden* v. *Stockbridge*, 63 Vt. 308.

The appeal from the order of removal was pending at the time the act of 1886 was passed. Section fourteen of the act provides that pending causes shall not be affected thereby, but the same may proceed to trial and judgment in the same manner and to the same effect as if the act had not been passed. The plaintiff's counsel contends, that, by reason of this provision of the act, the pauper should be regarded as a transient pauper, and that the plaintiff is entitled to recover by force of the statute relating to transient paupers. Under this section, the pending cause was excepted from the operation of the act, and it proceeded to trial and judgment in the same manner and to the same effect as if the act had not been passed. But this does not authorize a recovery in this action. There was no statute in force at the time the act was passed that would give such effect to the judgment. By the statutes in force at the time the act was passed, one town could not maintain an action against another town for the recovery of money paid out in support of a pauper, except in cases where the pauper, after an order of removal, could not be removed by reason of sickness or confinement in

jail, cases where it was finally adjudged that the pauper was unduly removed, and in the case of transient paupers. R. L. sections 2818, 2837, 2838, 2843; *Berlin* v. *Worcester*, 50 Vt. 23; *Pittsford* v. *Chittenden*, 44 Vt. 382; *Middlebury* v. *Waltham*, 6 Vt. 200.

The cause pending between the parties at the time the act was passed, was not a suit to recover money paid out in the support of the pauper, and a prosecution of it to final judgment did not have the effect to render the defendant liable under the statute relating to transient paupers. The appeal was prosecuted for the purpose of determining whether Darius H. Rowell and his family were duly removed to the defendant town, and it was adjudged that they were. The pauper in question being unemancipated, she took the settlement of her father, and the judgment was, in effect, an adjudication that she was not a transient pauper, that she had come to the plaintiff town to reside, and that her legal settlement was in the defendant town. *Rowell* v. *Vershire*, 62 Vt. 405; *Topsham* v. *Chelsea*, 60 Vt. 219. By prosecuting the cause, the plaintiff recovered its costs. If it had been adjudged that the paupers were unduly removed, the defendant would have had judgment for its costs and so much money as it had necessarily paid out for the support of the paupers; and it would have been the duty of the plaintiff to take back the paupers and pay all expense incurred in their support subsequent to such adjudication. R. L., ss. 2841, 2842. It was for the purpose of preserving the rights of parties in pending causes in these respects that section fourteen was enacted. The cause was prosecuted after the passage of the act upon the assumption that the paupers had been removed to the defendant town as is authorized by sec. 2834 of R. L., and had they been so removed, the plaintiff could not complain that the cause had not proceeded to "trial and judgment in the same manner and to the same effect" as if the act had not been passed, and the judgment would have

the effect of an adjudication that the pauper in question was duly removed. If the judgment does not have this effect, it is because the plaintiff did not remove the pauper when it might have done so, and not because of the passage of the act of 1886. The cause has proceeded to final judgment in the same manner and to the same effect as if the act had not been passed.

The plaintiff also claims that the pauper should be regarded as a transient pauper, because she is an idiot and can exercise no choice or intention in regard to the place of her residence. The agreed case shows that she has, for this reason, remained unemancipated. She being unemancipated, as one of her father's family, was amenable to an order of removal, and, being amenable to an order of removal, she is not a transient person. *Rowell* v. *Vershire, supra; Topsham* v. *Chelsea, supra.*

If she was a transient pauper and not amenable to an order of removal, then she was not included in the order that Darius H. Rowell and his family remove, and the cause pending between the parties at the time the act was passed, did not relate to her; and the plaintiff can claim nothing under section fourteen of the act, and its rights must be determined by the statute as amended by the act of 1886, and, when so determined, it cannot recover, for the reason that the defendant town is not the town where she last resided for three years, maintaining herself.

Judgment affirmed.

SILAS L. GRIFFITH *v.* JOHN H. HILLIARD.

Equity. Injunction against cutting timber. Question of title may be determined in law court.

1. **The Court of Chancery may, in its discretion, enjoin the cutting of timber upon premises which the orator alleges belong to him, before his title to the same has been established in a court of law.**

2. **If it appears from the answer that the title is in controversy, the court may order the orator to try that question in a court of law, continuing the temporary injunction meanwhile.**

Bill for an injunction to restrain the cutting of timber. Heard at the September term, 1890, Rutland county, upon the demurrer embodied in the defendant's answer. Taft, chancellor, dismissed the bill. The orator appeals.

J. C. Baker, for the orator.

If the orator is entitled to a jury trial upon the question of title the Court of Chancery can submit that issue. 2 Dan. Ch., 1080; 1 Sto. Eq. Jur., s. 72; *Garsed* v. *Beall*, 92 U. S. 684; *Fitton* v. *Assurance Co.*, 23 Fed. Rep. 3; *Adams* v. *Soule*, 33 Vt. 538; *Langdon* v. *Templeton*, 61 Vt. 122.

Equity will restrain a series of trespasses to prevent a multiplicity of suits. 2 Sto. Eq. Jur., ss. 928, 929; *Smith* v. *Pettingill*, 15 Vt. 82; *Gilchrist* v. *Van Dyke*, 63 Vt. 75.

H. A. Harman, for the defendant.

The defendant is entitled to have the question of who owns this land submitted to a jury. *White* v. *Booth*, 7 Vt. 131; *Smith* v. *Pettingill*, 15 Vt. 82; *Stevens* v. *Beekman*, 1 Johns. Ch. 318; *Jerome* v. *Ross*, 7 Johns, Ch. 315; 11 Am. Dec. 484.

The opinion of the court was delivered by

START, J. The defendant, John H. Hilliard, by the demurrer contained in his answer, claims that a Court of Equity

has no jurisdiction of the matters alleged in the bill. The bill alleges, among other things, that the orator is the owner of the land in question; that its substantial value is made up of the wood and timber growing thereon; that some of the defendants, under a license from the defendant Hilliard, have entered upon the land, are engaged in cutting and drawing timber therefrom, and threaten to continue to do so.

For the purpose of determining the question now before the court, these allegations must be taken as true. To permit this wood and timber to be cut in the manner the defendants are doing, and threatening to do, under a license from defendant Hilliard, is to permit a destruction of the orator's estate as it has been held and enjoyed. The power of a Court of Equity to interpose by injunction to prevent irreparable injury and the destruction of estates is well established, and this power has been construed to embrace trespasses of the character complained of in the orator's bill.

Where trespass to property consists of a single act, and it is temporary in its nature and effect, so that the legal remedy of an action at law for damages is adequate, equity will nor interfere; but if, as in this case, repeated acts are done or threatened, although each of such acts, taken by itself, may not be destructive to the estate or inflict irreparable injury, and the legal remedy may, therefore, be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction. *Smith* v. *Rock et al.*, 59 Vt. 232; *Langdon* v. *Templeton*, 61 Vt. 119; *Erhardt* v. *Boaro et al.*, 113 U. S. Sup. Ct. 537; *The West Point Iron Co.*, v. *Reymert et al.*, 45 N. Y. 703; *Falls Village Water Power Co.*, v. *Tibbetts*, 31 Conn. 165; *Irwin* v. *Dixon et al.*, 9 Howard 28; *Livingston* v. *Livingston*, 6 John. Ch., (Law. Ed.,) 496; High on Injunctions, 724-727; *Shipley* v. *Ritter*, 7 Md. 408 (61 Am. Dec. 371); *Scudder* v. *Trenton Delaware Falls Co. et al.*, (23 Am. Dec. 756); 1 N. J. Eq. 694; 1

Pomeroy's Eq. Jur., sec. 245; 3 Pomeroy's Eq. Jur., sec. 1357; *Murphy* v. *Lincoln et al.*, 63 Vt. 278.

In the case of *Murphy* v. *Lincoln et al.*, *supra*, the bill charged the committing of several trespasses by the defendants by drawing wood and logs across the orator's land. The defendants claimed a right of way. The Court found the issue of fact in favor of the orator and held that a Court of Equity had jurisdiction to enjoin the commission of a series of trespasses, although the legal remedy be adequate for each single act if it stood alone.

It is said by Judge Story in his work on Equity Jur., vol. 2, ss. 928 and 929: "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of Courts of Equity. Formerly, indeed, Courts of Equity were extremely reluctant to interpose at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. In short, it is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited right with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property."

In the *West Point Iron Co.* v. *Reymert et al.*, *supra*, it is said that mines, quarries, and timber are protected by injunction, upon the ground that injuries to, and depredations upon, them are, or may cause, an irreparable damage, and, also, with a view to prevent a multiplicity of actions for damages, which might accrue from continuous violations of the rights of the owners; and that it is not necessary that the right should be first established in an action at law.

In *Erhardt* v. *Boaro et al.*, *supra*, Mr. Justice Field says: "It is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the

substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the Court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title."

When it appears that the title is in dispute, the Court may, in its discretion, issue a temporary injunction and continue it in force for such time as may be necessary to enable the orator to establish his title in a court of law, and may make the injunction perpetual when the orator has thus established his title; or the Court may proceed and determine which party has the better title; or it may dismiss the bill and leave the orator to his legal remedy. *Bacon* v. *Jones*, 4 Mylne & Craig 433; *The Duke of Beaufort* v. *Morris*, 6 Hare 340; *Campbell* v. *Scott*, 11 Simons 31; Kerr on Injunctions, 209; *Ingraham* v. *Dunnell et al.*, 5 Met. 118; *Rooney* v. *Soule*, 45 Vt. 303; *Wing, Admr.*, v. *Hall et al.*, 44 Vt. 118; *Lyon* v. *McLaughlin*, 32 Vt. 423; *Hastings, Admr.*, v. *Perry et al.*, 20 Vt. 278; *Barnes* v. *Dow*, 59 Vt. 530; *Barry* v. *Harris*, 49 Vt. 392.

In *Bacon* v. *Jones*, *supra*, Lord Cottingham says: "The jurisdiction of this Court is founded upon legal rights; the plaintiff coming into court on the assumption that he has the legal right, and the Court granting its assistance on that ground. When a party applies for the aid of the Court, the application for an injunction is made either during the progress of the suit or at the hearing; and, in both cases, I apprehend great latitude and discretion are allowed to the Court in dealing with the application. When the application is for an interlocutory injunction, several courses are open; the Court may at once grant the injunction *simpliciter*, without more; a course which, though perfectly competent to the Court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or

it may follow the more usual, and as I apprehend, more wholesome practice, in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant, in the meantime, keeping an account. Which of these several courses ought to be taken, must depend entirely upon the discretion of the Court, according to the case. When the cause comes to a hearing, the Court has also a large latitude left to it; and I am far from saying that a case may not arise in which, even at that stage, the Court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right and of the evidence by which it is established, these and other circumstances may combine to produce such a result, although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless, it is a course unquestionably competent to the Court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted, will do justice between the parties. Again, the Court may at the hearing, do that which is the more ordinary course, it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case, that of dismissing the bill at once." Although *Bacon* v. *Jones* was a case relative to a patent right, the remarks of the Lord Chancellor are applicable to any case in which the orator's title is in dispute.

The case of the *Duke* of *Beaufort* v. *Morris*, *supra*, was a bill for an injunction to protect the orator's coal mines from injury from the water flowing into them from the defendant's colliery; and it was ordered that the bill be retained for twelve months, with liberty to the orator to bring such actions as he

might be advised were necessary, and that the injunction issued in the cause be continued for such time.

We think the granting of the temporary injunction in this case was a proper exercise of the discretionary power which the court possesses. The orator, by his bill makes out a strong case for equitable consideration. The sole value of the premises in question is in the wood and timber growing thereon. The orator has heretofore held and occupied them for the purpose of manufacturing lumber and charcoal from such timber and wood. He has expended large sums of money in the erection of mills and coal kilns, in building roads, and in procuring teams and workmen for the prosecution of said business, and has made contracts for the sale of said manufactured products. The defendants are engaged in cutting and removing that which constitutes the chief value of the estate, and threaten to continue to do so. These acts, if continued, will work a destruction of the estate and render it of no value for the purpose for which it has been held and enjoyed. The case is one peculiarly within the province of a court of equity, through its preventive writ to interpose and stop the mischief complained of and preserve the property from destruction.

The defendant, John H. Hilliard, having, before any evidence has been taken or hearing had, put in issue the orator's title, insisted that this issue be tried in a court of law, the case is one in which the court may properly, in its discretion, require the orator to establish his title in such court before proceeding further with the cause; and such will be the order of this court.

The pro forma decree of the Court of Chancery is reversed, the demurrer contained in the answer of the defendant, John H. Hilliard, is over-ruled, the orator's bill is adjudged sufficient, and defendant Hilliard's answer is ordered brought forward, from which is appears that the orator's title to the premises is in controversy; therefore, the cause is remanded to the Court of Chan-

cery, with direction to that court to retain the cause and continue in force the injunction for such time as, in the opinion of said court, may be necessary to enable the orator to bring and prosecute to final judgment such action or actions as may be necessary to establish his title in a court of law. And in default of the orator so establishing his title, within the time aforesaid, the orator's bill to be dismissed, as against the defendant, John H. Hilliard, with costs. But if the orator shall, within the time aforesaid, by a final judgment in his faver in a court of law, establish his title to the premises, as against the defendant, John H. Hilliard, then the Court will enter a decree making perpetual the temporary injunction, and make such order in relation to costs as to the Court shall seem meet.

Taft, J., did not sit, for reasons stated in *Stetson et al.* v. *Stevens et al., post.*

A. M. STETSON ET AL. *v.* CLARK STEVENS ET AL.

Injunction to restrain the cutting of timber. Griffith v. *Hilliard, supra, followed.*

Bill to restrain the cutting of timber. Heard upon bill and answer at the March term, 1891, Essex county, Ross, chancellor, dismissed the bill *pro forma*, and the orators appealed.

The facts in this case were the same in principle as those in *Griffith* v. *Hilliard, supra.*

D. S. Storrs and *Geo. N. Dale*, for the orators.

Equity will grant this injunction to prevent irreparable injury. *Erhardt* v. *Boaro*, 113 U. S. 538; *U. S.* v. *Parrott et al*, 1 McAllister (U. S. C) 317; *Dows* v. *City of Chicago*, 11 Wall. 112; *Union Pacific Railroad Co.* v. *Cheyenne*, 113 U.

S. 526; *Shelton* v. *Platt*, 139 U. S. 594; *West Point Iron Co.* v. *Reymert*, 45 N. Y. 703; *Kidder* v. *Jones*, 17 Ves. 110; *Thomas* v. *Oakley*, 18 Ves. 184; *Norway* v. *Rowe*, 19 Ves. 147; *Keystone Iron Co.* v. *Martin*, 132 U. S. 92; *Hicks* v. *Michael*, 15 Cal. 116; *Smith* v. *Fleck*, 69 Pa. St. 474; *Fulton* v. *Harmon*, 44 Md. 267; *Shipley* v. *Ritter*, 7 Md. 408; *Irwin* v. *Donelson*, 3 Ired. 316, 317; *Mills* v. *Company*, 65 Miss. 391; *Sullivan* v. *Robb*, 5 S. Rep. 746; High Inj. s. 724; *Shreve* v. *Black*, 3 Green Ch. (N. J.) 177; Clark's Appeal, 62 Pa. St. 447; Sto. Eq. Jur., s. 928: *Smith et al.* v. *City of Rochester*, 92 N. Y. 485; *White* v. *Flannigan*, 54 Am. Dec. 668; *Chesapeake Canal Co.* v. *Young*, 3 Md. 389; *Shipley* v. *Ritter*, 7 Md. 413; *Gilbert* v. *Arnold*, 30 Md. 37; *Powell* v. *Rawlings*, 38 Md. 241.

Repeated trespasses may be enjoined although a single one of the series would not be. *Lyon* v. *Hunt*, 11 Ala. 295, 46 Am. Dec. 216; *Scudder* v. *Trenton & Co.*, 1 N. Y. 69; *Poindexter* v. *Henderson*, 12 Ind. 550; *Burnley* v. *Cook*, 13 Texas 586; *De La Croix* v. *Villiere*, 12 La. Ann. 39; *Martyr* v. *Lawrence*, 2 D. J. and S. 261; Kerr's Inj., star page 331; *Kerlton* v. *West*, 3 N. J. Ch. 449; *Irwin* v. *Donelson*, 8 Ired. 316, 317; *West Point Iron Co.* v. *Reymert*, 45 N. Y. 705.

Osian Ray and *Ide & Quimby*, for the defendant.

The commission of a trespass will not be enjoined unless the trespasser is insolvent or the injury irreparable. Hill. Inj. ch. 10. Trespass, pp. 318, 322; Kerr Inj. pp. 293, 296.

The opinion of the court was delivered by

START, J. This cause was heard on the defendant's demurrer to the orators' bill. The defendants, by their demurrer, claim that the orators' bill does not disclose any equity; that the orators have an adequate remedy at law touching all the material facts alleged therein; and that a Court of Equity has no jurisdiction of the matters therein set forth. The decision of this court

in *Griffith* v. *Hilliard et al.*, heard at this term of court and reported in this volume, is decisive of all the questions raised by the demurrer.

The pro forma decree of this Court of Chancery is reversed, the demurrer contained in the answer is overruled, the orators' bill is adjudged sufficient, and the answer is ordered brought forward, from which it appears that the orators' title to the premises is in controversy; therefore, the cause is remanded to the Court of Chancery, with direction to that court to retain the cause and continue in force the injunction for such time as, in the opinion of said court, may be necessary to enable the orators to prosecute, or bring and prosecute to final judgment such action or actions as may be necessary to establish their title in a court of law. And in default of the orators so establishing their title, within the time aforesaid, the orators' bill to be dismissed with costs. But if the orators shall, within the time aforesaid, by a final judgment in their favor in a court of law, establish their title to said premises, as against the defendants, then said Court will enter a decree making perpetual the temporary injunction issued in said cause, and make such order in relation to costs as to said court shall seem meet.

Taft, J., having passed upon the question below in granting the injunction, did not sit.

JAMES LEGG, JR., ADMR. *v* HENRY S. BRITTON.

Death by wrongful act. R. L. s. 2138 gives but one right of action.

1. In construing a statute the court should consider, first, the language of the act taken as a whole; second, the application of that language to existing circumstances and necessities.
2. R. L. s. 2138, providing for the recovery of damages for the benefit of the widow and next of kin, where death results from the neglect or default of a person, does not create a new and additional cause of action in favor of such beneficiaries, but provides for the recovery of a new class of damages in case a right of action would have existed in the deceased person if living.
3. Hence, if this right of action be extinguished in the lifetime of the injured person, as by a settlement or recovery, no further recovery can be had after his death.
4. And where the injured person began a suit in his lifetime which his administrator prosecuted to judgment after his death, such judgment will bar a second suit for the benefit of the widow, although the damages awarded in the first suit were solely for the injuries to the deceased person in his lifetime.

Action for the benefit of the widow and next of kin for the wrongful act of the defendant resulting in the death of the plaintiff's intestate. Heard at the December term, 1890, Windsor county, upon demurrer to the plaintiff's replication to the defendant's plea in bar. The demurrer was *pro forma* overruled, and the defendant excepted.

The defendant pleaded in bar that the intestate in his lifetime began suit against the defendant for the same neglect which was now alleged by the plaintiff to have occasioned his death, and deceased while said suit was pending; that thereupon his administrator entered and prosecuted the same to a judgment which the defendant paid. The plaintiff replied that the damages re-

covered and paid in that suit were for the injuries done the intestate in his lifetime, and did not include the damages occasioned his widow and next of kin by his death.

W. E. Johnson and *Gilbert A. Davis*, for defendant.

This precise question was determined in *Halliday* v. *Dover*, decided at the General Term, 1881, but not reported.

But one recovery against a party for the same act or neglect can be had. *Bardwell* v. *Jamaica*, 15 Vt. 438; *Whitney* v. *Clarenden*, 18 Vt. 262; *Fulsome* v. *Concord*, 46 Vt. 135; 1 Sedg. Dam. (7th Ed.) 207, [109.]

At common law if the party injured died before judgment no recovery could be had. *Ins. Co.* v. *Brame*, 95 U. S. 754; The Harrisburg, 119 U. S. 199.

The intention of R. L. ss. 2138, 2139 was to remedy this injustice, not to create an additional right of action; and this is the construction which the English courts have put upon Lord Campbell's act, of which our statue is a re-enactment. *Read* v. *Great Eastern Ry. Co.*, L. R. 3 Q. B. 555.

To the same effect are the decisions in the different states, and the opinions of text-writers. *Diffle* v. *New York & Erie Rd.* 25 Barb. 183; *Littlewood* v. *Mayor of New York*, 89 N. Y. 24, 29; *Schlichting* v. *Wintgen*, 25 Hun. 626, 629; *Whitford* v. *Panama Rd. Co.*, 23 N. Y. 484; *Conners Adm'x.* v. *Paul*, 12 Bush. Ky. 144; *McCarthy* v. *Rd. Co.*, 18 Kan. 46; *Goodsell* v. *H. & N. H. Rd., Co.*, 33 Conn. 54; *Fowlker* v. *Nashville, etc. Rd. Co.*, 5 Baxter 663; Cool. Torts, 264; 1 Sher. & Red. Neg., s. 140; Add. Torts 621; *State* v. *Maine Central Rd. Co.*, 60 Me. 490; *State* v. *Grand Trunk Ry. Co.*, 61 Me 114.

Hunton & Stickney, for the plaintiff.

When Lord Campbell's was adopted in Vermont in 1849, actions for injuries to the person resulting in death already survived by the act of 1847. The intention of the legislature could not have been therefore to remedy this defect. The inten-

tion must have been to give a new right of action for the benefit of the widow and next of kin which did not exist at the common law, to compensate them for the injury which they sustained by the loss.

Specific damage may be the foundation for an action for damages although no right is infringed. *Ferrer* v. *Beale*, I Lord Raymond, 692, *Hall* v. *Hollander*, 4 B. & C. 660; *Weldon* v. *Timbrell*, 5 T. R. 357.

More than one right of action may accrue from the same tort. *Smith* v. *Hixon*, 2 Strange [977].

This court has already held that under the statute two causes of action arise. *Needham Adm'x* v. *G. T. Rd. Co.*, 38 Vt. 294.

And such taken as a whole is the conclusion of the English courts. *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93; *Pym* v. *Great Northern Ry. Co.*, 2 B. & S. 396; *Bradshaw* v. *Lancashire & Yorkshire Ry. Co.*, 10 L. R. C. P. 192; *Leggott* v. *G. N. Ry.*, *Co.*, pr. Quain, J., 122 B. Div. 606.

To the same effect are *Hurlbert* v. *City of Topeka*, 34 Fed. Rep. 510, 512; *Armstrong* v. *Beadle*, 5 Sawyer, 484.

The manifest import of the statute is to create a new right of action, not to continue an old one. The kind and extent of the damages, the parties for whose benefit and the manner in which they shall be recovered, are all new. *Railroad Co.* v. *Barron*, 5 Wall. 90, 105; *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93; *Woodard* v. *Mich. S. & N. I. Rd.*, 10 Ohio St. 121-123, pr. Gholson, J.; *Hyatt* v. *Adams*, 16 Mich. 180, 194; *V. & M. Rd. Co.* v. *Phillips*, 64 Miss. 693, 703; *Quin* v. *Moore*, 15 N. Y. 435; *Penna. Rd.* v. *McCloskey's Admr.*, 23 Pena. St. 526, 529; *Safford* v. *Drew*, 3 Duer, 627; *C. & R. I. Rd. Co.* v. *Morris*, 26 Ill. 400; 2 Thomp. Neg. 1289, s. 90 and cases there cited.

There was no recovery in the former suit of the damages sued for here. The widow and children have never received those damages which the statute awards them; therefore they

may still maintain this action for them. *Whitney's Admr.* v. *Clarendon*, 18 Vt. 252; *Hodsoll* v. *Stallebrass*, 39 E. C. L. 178, 11 A. & E. 301, 304; *Barnet* v. *Lucas*, 6 Ir. C. L. 247.

The cases holding that a settlement is a bar are upon the theory that full recompense was thereby made.

The opinion of the court was delivered by

ROSS, Ch. J. The intestate was injured by the unlawful act or neglect of the defendant. He brought a suit to recover therefor, and pending the suit died, it is claimed from the injury so received. His administrator entered, and prosecuted that suit to final judgment, which has been satisfied. The administrator subsequently brought this action under R. L. 2138, to recover for the widow and next of kin the pecuniary injury resulting to them from the death of the intestate. To this action the defendant has plead in bar the judgment in the suit commenced by the intestate in his lifetime, and its satisfaction. The contention is whether the plea is a good answer to this suit. Each party claims that this contention is settled in his favor by former decisions of this Court. The plaintiff relies upon *Needham* v. *Grand Trunk Railway Co.* 38 Vt. 294. In that case the question is discussed at length, and the views of the Court given thereon in favor of the plaintiff's contention. That decision made in 1865 remained unquestioned until 1881. It is referred to, not by name, but, in principle, with approval by Judge Peck in *Harding* v. *Townshend*, 43 Vt. 541, and by Taft, J., in *Westcott* v. *C. V. R. R. Co.*, 61 Vt. 440. But in neither case was the question in controversy under consideration, nor was there any attempt to discuss or decide it. Nor was this question involved in the point decided in *Needham* v. *Grand Trunk Railway Company.* The point decided in that case is, that the injury to the deceased having occurred in New Hampshire, under whose then existing laws no right of action in either form survived, the plaintiff could not maintain an action therefor in this State. This Court held, as is everywhere held, that the laws

of the place of the accident occasioning the injury, governed the rights of the parties in reference thereto. To this decision it was not necessary to consider, whether under the laws of this State, one or more rights of action survived to the administratrix. We fully recognize, however, the ability of the Court rendering that decision, and the ability with which the question, whether the Statutes of Vermont for such an injury gave one or two rights of action, is discussed. The defendant relies upon the unreported case of *Haliday et al., Admrs.*, v. *Dover*, heard and decided at the general term of this Court in 1881. The precise question raised in this case was raised in that case, discussed and considered. Judge Veazey, to whom the case fell, drew up an opinion upon this question which met the approval of a majority of the court, in effect overruling some of the conclusions maintained in *Needham* v. *Grand Trunk Railway Co.* But, as one or more of the judges did not concur in the views he had expressed, the case was not published, and, as Judge Veazey now recollects, was finally disposed of, on the insufficiency of the notice to the town. Hence, so far as concerns the views previously expressed by this Court on this question, we have the published views in the Needham case, in which the question did not properly arise, and need not have been considered, and the unpublished views of a majority of this Court in the Haliday case in which the identical question did arise and was considered, but which eventually was made to turn on another question in the case. In the condition of the decided cases in this State, the question is fairly open for consideration and decision. It has been very fully and ably discussed by counsel on both sides. We have examined and carefully considered the views of the respective attorneys, the many cases cited, and the views of law writers on the various questions, which have arisen upon the provisions of the Statute 9 and 10 Vict. c. 93 secs. 1 and 2, known as Lord Campbell's Act, and statutes of the several States of like legal import. We shall not attempt to review them, nor to point out

wherein the statutes or decisions differ, but rather confine ourselves more especially to a consideration of the statutes of Vermont. Before the passage of No. 42 of the Acts of 1847, and No. 8 of Acts of 1849, the right of action for personal injuries resulting in death did not survive. *Needham* v. *Grand Trunk Railway Co., supra.* This was the common law doctrine announced by Lord Ellenborough in *Baker* v. *Bolton et al.*, 1 Camp. 493, and generally followed. Note to *Carey* v. *Berkshire Railroad Co.* 48 Am. Dec. 616, 632. The act of 1847 is substantially R. L. 2134 and 2135. This act caused to survive actions for the recovery of damages for a bodily hurt or injury occasioned by the act or default of the defendant although one of the parties should die pending the action. It also provides that such an action might be prosecuted by or against an executor, or administrator, where by law that mode of prosecution is authorized or before commissioners, when appointed. Such damages could be recovered as the person injured could have recovered if he had survived, including expense for doctoring and nursing, loss of service, and compensation for pain and suffering. The damages so recovered became a part of the estate of the deceased, and were disposed of under the law as such. The Act of 1849 in legal effect is embodied in R. L. 2138 and 2139. The determination of the contention in this case depends upon the construction given to K. L. 2138, which reads: "When the death of a person is caused by the wrongful act, neglect or default of a person, either natural or artificial, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person or corporation liable to such action if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death is caused under such circumstances as amount in law to a felony." The contention is whether this section gives a right

of action to the representative of the deceased person for the benefit of his widow and next of kin, as provided in the following section, when the deceased, in person, or through his representative, has recovered or settled for the injury which occasioned his death. In giving construction to this section of the statute, it is the duty of the court to ascertain and carry into effect the intention of the legislature. That intention is to be ascertained, first from the language of the act taken as a whole; and secondly, from its application to existing circumstances and necessities. It is to be presumed that it used language appropriate to express its intention, when applied to existing circumstances and needs. It is to be borne in mind that hist and the act of 1847 are acts passed with reference to the survivorship of actions. The language used clearly gives the same right of recovery which would have existed in the intestate if death had not ensued. If therefore, by settlement or recovery in or as of his lifetime no right of action existed or remained in the intestate, none survived to his executor or administrator. So also, if, by settlement or recovery by the intestate in or as of his lifetime no liability rested upon the wrongdoer at his decease, none survived his death against the wrongdoer. Although such recovery should be by an executor or administrator in a suit commenced by the intestate, or commenced by such executor or administrator, if the recovery be in the right of the intestate while living, such recovery, in legal effect, would antedate the death of the intestate, exhaust his right of action, and nothing would remain to survive for a subsequent action. It would also exhaust the liability of the wrongdoer, and no liability would remain to be enforced in a subsequent suit. This it seems to us, is the natural meaning of the language of this section of the act of 1849. It is the construction placed by the English Court upon Lord Campbell's Act, of which this section

of the act of 1849 is nearly a copy, and which generally has been placed upon acts of like legal import in this country. *Read* v. *Great Eastern Ry. Co.*, 9 Best & S. 714, S. C. 37, L. J. Q. B. 278. Note to *Carey* v. *Berkshire R. R. Co.*, 48 Am. Dec. 637. Article by Hon. Chas. R. Darling, Am. L. Reg. 1889, pp. 385, 513, 577, 583.

But the whole act of 1849 is to be considered as contended by the plaintiff. The remainder of the act is embraced in R. L. 2139. Its provisions relate to the manner of enforcing the right given in R. L. 2138, and to pointing out the persons, to whose benefit its enforcement shall enure. It does not attempt to define or create the right. As there defined the recovery is not for the intestate nor his estate, although for an injury to him while in life. The recovery is for the benefit of his widow and next of kin. The damages are to be assessed, not with reference to the loss sustained by the intestate, but with reference to the pecuniary injury resulting to them from his death. It is contended that the statute gives a new right of action. Strictly it is a new right of recovery arising from an injury to the intestate, which gave or would have given him a right of action and of recovery, if death had not ensued. The amount to be recovered is determined by the injury sustained by the widow and next of kin, resulting from the death of the intestate wrongfully occasioned by the defendant. The right of recovery and measure of damages are different from what existed in the intestate. This right of recovery did not exist at common law. It is wholly given by the act. It is not an act to cause to survive a right of recovery which otherwise would be taken away by the death of the injured. The damages are based mostly upon the wrong ful destruction of the earning capacity of the intestate. But his earnings in life do not legally belong to his wife and next of kin. Without the act the widow and next of kin could recover no damages for the destruction of the earning capacity of the intestate. Their right of recovery is given and determined by

the act. If we have interpreted the language of the act correctly, this right of recovery is conferred only when the intestate would have had remaining a right of action if he had survived.

It is contended by the defendant that to construe the act as claimed by the plaintiff would result in giving double damages to the same injured parties for the same wrongful act or neglect. If recovery is had in the right of the intestate under R. L. 2134 and 2135 one element of damages would be the bodily pain and suffering caused to the intestate by the wrongful act or neglect occasioning his death. The natural effect of such pain and suffering is to weaken, and if of adequate intensity sufficiently continued, to destroy the vital forces. The dam ages for this element recovered in the right of the intestate, may be said indirectly, if not directly, to be given for destroying the life of the intestate and ending his earning capacity. Such damages are not given to make up to his estate what it has lost by the wrongful injury. Unless required to pay the debts of the estate they are distributed to the widow and dext of kin. But the bulk of the damages recovered in the right of the intestate are different from those recovered for the benefit of the widow and next of kin. Whether the recovery be in the right of the intestate, or for the benefit of his widow and next of kin, it is for the same wrongful act or neglect. In conferring this new right of recovery for the same wrongful act, the legislature could place such limitations upon it as it judged expedient. As contended by the plaintiff, the same wrongful act frequently furnishes two independent rights of recovery, as in the case of an injury to the wife, or an injury to a servant. But in such cases the services of the wife and of the servant, lost by the injury, legally belong to the husband and to the master. Hence whether the damages recovered if two actions are given, may, to some trifling extent, be double, or whether the same injury sometimes gives two independent legal rights of recovery throws very little light upon the intention of the legislature in

passing the act of 1849. A wrongful injury resulting in the death of the person injured unless the death is instantaneous may work serious loss and damage to him while living, and to his estate and, at the same time, deprive his widow and next of kin of what he would have earned and saved, but for the injury. Yet what any person's earnings for the future may be, let his earning capacity when injured be what it may, is largely hypothetical. The length of life, and the continuance of the power to earn, or to save if earned, are quite uncertain factors in the problems of life. Length of life, and capacity to earn and save for the support and use of others are pretty uncertain elements on which to estimate damages to such others. It may well be doubted if the legislature intended that resort should be had to such doubtful elements, for ascertaining damages where the intestate, while in life, or his executor or administrator, had received satisfaction, by settlement, or by recovering in his right the actual damages sustained by the intestate from the wrongful act or neglect.

The plaintiff further contends that the act of 1849, upon the construction we have given it, was wholly unnecessary; that by act of 1847 the intestate or his executor or administrator could recover all the actual damages sustained by the intestate. But no recovery could be had under the act of 1847 in case the death was instantaneous. The act of 1847 provides for the recovery of damages for a bodily hurt or injury, occasioned by "the act or default" of a party notwithstanding one of the parties to the action dies. Its language makes no reference to a wrongful act, such as amounts to a felony. While under it, recovery could be had for a wrongful act, amounting to a crime, if it caused bodily hurt or injury, there might have been doubt in the minds of legislators whether it would be construed to include such act or default. Then the legislature might have considered that there would be likely to be cases where death would follow so speedily that no recovery could be had in the life of the intestate, and if

recovery were had in his right by his executor or administrator, the damages would be a trifling sum; or his estate might be in such condition that they would be absorbed in paying the debts of the intestate. Hence it might have thought it wise in such cases to allow a recovery for the benefit of the widow and next of kin. On the construction we have placed upon the act of 1849, a recovery for the widow and next of kin would not be barred, except by a settlement or recovery in the right of the intestate, and there was proper office for the act of 1849 to serve.

It is also contended by the plaintiff that the act of 1849, which, in legal import, is Lord Campbell's Act, should not receive the same construction which has been given to the latter, because the latter, in terms provided that but one suit should be brought,while the Acts of 1847 and of 1849 provided for the surviving of two distinct rights of recovery, for the same wrongful Act. But the limitation in Lord Campbell's Act was with reference to suits brought under it. It provided that but one suit should be brought for all the beneficiaries, or sharers in the damage recovered. The legal representatives or beneficiary bringing the suit, was required to name all the persons for whose benefit it was brought. The fact that by the act of 1847, the action survived to the executor or administrator of the deceased injured person, when death did not follow instantly, does not disclose any necessity for giving broader scope to the language of the act of 1849, than has been given to language of like legal import in Lord Campbell's Act, and other similar acts in the various United States. In Maine and some other states it is held that the acts of those states framed after Lord Campbell's Act, give a right of action only when instant death follows the injury. In some other states it is held that the legal representative of the estate must elect either to sue in the right of the intestate or in the right of the wife and next of kin. The construction we have placed on the act of 1849 gives the

administrator or executor the right to sue and recover for the wife and next of kin, wherever the intestate if he were living could have maintained an action for such act causing the injury occasioning the death. We do not think any practical difficulty will be experienced in administering the act thus construed. We find nothing in the circumstances or necessities attending the passage of the act of 1849 which requires a construction different from that required by the language of the act.

The pro forma judgment reversed, demurrer sustained, replication adjudged insufficient, plea in bar adjudged sufficient and cause remanded.

Taft, J , dissenting.

INDEX.

ABUSE OF PROCESS.

The authority issuing a lawful precept is not liable for an abuse in its execution, and this is true of an order to commit for contempt of court. *Rudd* v. *Rounds*, 456.

ACCEPTANCE.

Held, that upon the facts in this case there was an acceptance of the order. *Holmes* v. *Laraway*, 175.

ACCOUNT.

1. A partner may, under R. L. ss. 1214, 1215, sustain the action of account against a surviving partner and the administrator of a deceased partner. *Park* v. *McGowen et al.*, 173.

2. The declaration in such a suit need not allege that the administrator has received property belonging to the estate or to the firm. *Ib.*

ACKNOWLEDGMENT. *See* LIMITATION OF ACTIONS 6, 7.

ACTION. *See* DEATH FROM WRONGFUL ACT 1, 2, 3.

AD DAMNUM.

The plaintiff in an action upon a *quantum meruit*, may recover a sum larger than the *ad damnum* in his declaration. The *ad damnum* is merely the plaintiff's estimate of what he is entitled to, and is not conclusive upon him. *Maughan* v. *Burns' Estate*, 316.

See TRIAL 6.

ADJOURNMENT. *See* COUNTY COURT 1, 2.

ADMINISTRATOR. *See* EXECUTORS AND ADMINISTRATORS; PARTIES 1.

ADVERSE POSSESSION. *See* RAILROAD COMPANIES 3; SCHOOLS AND SCHOOL DISTRICTS 3, 4.

AGENCY.

Held, that there was nothing in this case calling for an instruction that defendant Eaton might be liable by reason of having held Knox out to the world as his accredited agent. *Good* v. *Knox et al.*, 97.

AGENT. *See* HUSBAND AND WIFE 12, 13.

ALIMONY. *See* MARRIAGE AND DIVORCE.

AMBIGUITY. *See* DEED 1.

AMENDMENT.

1. The complaint of a grand juror cannot be amended in matter of substance in the Appellate Court. *State* v. *Wheeler*, 569.

2. A complaint alleging that the respondent "became and was" intoxicated is defective in matter of substance and cannot be amended in the County Court so as to read "was found" intoxicated. *Ib.*

See CRIMINAL LAW 1, 2; TRIAL 7.

ANIMALS. *See* RAILROAD COMPANIES 5.

APPEAL.

The County Court has appellate jurisdiction of matters within the original jurisdiction of the Probate Court, and in the consideration of those matters is not confined to the questions actually considered in the Probate Court. *Maughan* v. *Burns' Estate*, 316.

See JUSTICE OF PEACE 3.

ARGUMENTATIVENESS. *See* PLEADING 2.

ASSAULT AND BATTERY.

1. Mere words, however abusive or insulting, will not justify an assault and battery. *Willey* v. *Carpenter*, 212.

2. Nor is it a valid defence to a civil action for an assault and battery that the plaintiff consented thereto. *Ib.*

ASSUMPSIT. *See* LANDLORD AND TENANT 3.

ATTACHMENT. *See* CONDITIONAL SALE 2; HUSBAND AND WIFE 10; OFFICER 2.

BAILMENT.

1. The owner of a saw mill may by special contract define the conditions under which he will receive and keep logs delivered at his mill for the purpose of being sawed. *Ames & Co.* v. *Melendy*, 554.

2. If he absolutely agrees to be liable for the safe keeping of such logs, the owner, in case of loss, need not show negligence. *Ib.*

BETTERMENTS.

1. The buildings upon the premises having become uninhabitable, the orator should be allowed the value of those which it erected with the approval of the wife and for her occupation. *Brighton* v. *Doyle et al.*, 616.

2. And this sum may be allowed the orator in a foreclosure suit. *Ib.*

See MORTGAGE 7.

BOOK ACCOUNT. *See* LIMITATION OF ACTIONS 4, 7.

BREACH OF PEACE. *See* CRIMES AND OFFENCES 1, 2.

BURDEN OF PROOF.

1. The action being for the amount of an over-draft paid by the plaintiffs upon the draft of the defendant for certain butter, which the plaintiffs alleged had not been delivered to them, an instruction from the court that the plaintiffs' right of action depended upon whether the butter was delivered by the defendant, and that in making out their case the burden was upon the plaintiffs, sufficiently informs the jury that the plaintiffs must assume the burden of proving that the butter was not delivered. *Noyes, French & Fickett* v. *Parker*, 379.

2. If the defence to a note be want of consideration, the plaintiff cannot by proof of the execution and delivery of the note cast upon the defendant the burden of making out this defence. The burden of proof is still upon the plaintiff to show a consideration, although the note itself would be an important piece of evidence to be weighed in his favor. *Stevenson* v. *Gunning's Estate*, 601.

CASES OVERRULED AND CRITICISED.

Strafford v. *Sharon*, 61 Vt. 126.

CERTAINTY. *See* PLEADINGS 15, 16.

CERTIFICATE OF DEPOSIT. *See* DEMAND 1; NOTES AND BILLS 3, 4.

CHARGE OF COURT.

1. *Held*, that the court below sufficiently instructed the jury that the injury to the plaintiff's horse must have been caused by the neglect of the defendant to properly fence its road. *Smith* v. *Barre Rd. Co.*, 21.

2. *Held*, that the charge fairly gave the jury to understand that the guardian of an insane person might provide for the support of his ward in the ward's own home, as well as elsewhere, if he desired. *Maughan* v. *Burns' Estate*, 316.

3. It was not error for the court to refuse an instruction that there was no evidence of fraud upon the part of the defendant, inasmuch as the question of fraud was in no way an issue in the case. *Noyes, French & Fickett* v. *Parker*, 379.

4. Nor to refuse the instruction that "testimony tending to show that a witness had made statements out of court that contradict his testimony in court, is to be weighed with caution." *Ib.*

5. The court is not bound to express an opinion as to the weight of evidence, nor is that the usual or better practice, although it may be done in such a way as not to be reversible error. *Ib.*

6. It is not error to refuse a particular instruction, if the legal principle embodied in it, as applicable to the case on trial, is correctly stated in some other instruction. *Ballard* v. *Burton*, 387.

7. Whether the defendant himself received any consideration is immaterial, and the submission of that issue to the jury was not error. *Ib.*

See TRIAL 1, 2, 3, 5.

CHATTEL MORTGAGE.

1. A, being surety for B upon a promissory note, promised to pay the note according to its tenor, and in consideration thereof B promised to pay A the amount of the note and secure the performance thereof by chattel mortgage. *Held*, that the oath in the mortgage properly described the debt from B to A as an absolute one. *Green* v. *Kelley*, 309.

2. Under R. L. 1181, which provides that an officer, having under attachment property encumbered by chattel mortgage, may demand of the mortgagee a written statement under oath of the amount due, which the mortgagee shall render within fifteen days; a demand for such a statement *forthwith* is not within the statute, and the mortgage lien will not be discharged by failure to render the statement within fifteen days from such a demand. *Ib.*

3. The attorney for the attaching creditor may waive the rendering of such an account or extend the time within which it shall be rendered after a proper demand made. *Ib.*

4. *Held*, that the evidence in this case tended to show such a waiver or extension. *Ib*

5. A sale upon chattel mortgage of the entire property, although but one year's interest upon the debt was then due, would not discharge the proceeds from the mortgage lien, even if such sale were unauthorized; certainly not if the mortgagor were present, participated in and consented to the sale. *Ib.*

6. The plaintiff's mortgage covered "one brown mare twelve or thirteen years old." When the mortgage was executed the mare was with foal, and the defendant subsequently bought the colt in good faith after it had ceased to follow the mother for the purpore of nurture. *Held*, that the plaintiff had no title to the colt as against the defendant, for it was not fairly embraced within the description, and the plaintiff had never taken possession of it. *Enright* v. *Dodge*, 502.

7. Nor would it alter the case if the defendant was informed at the time of purchasing the colt, that the mother was mortgaged to the plaintiff, but the colt was not. *Ib.*

COLLATERAL ISSUE. *See* EVIDENCE 29.

COMMISSIONERS. *See* RAILROAD COMPANIES 1, 2.

COMMITTEE OF PARTITION. *See* PROBATE COURT 1, 2.

COMPETENCY. *See* WITNESS 6, 8.

COMMITTEE. *See* SCHOOLS AND SCHOOL DISTRICTS 5, 6, 7.

COMPLAINT. *See* AMENDMENT 1, 2.

CONDITION PRECEDENT. *See* CONDITIONAL SALE 1.

CONDITIONAL SALE.

1. A waterwheel and shafting attached to a lumber mill in the usual manner retain their character as chattels in favor of a conditinnal vendor as against a prior mortgage. *Page* v. *Edwards*, 124.

8. And this is so although old machinery covered by the mortgage was taken out to make room for the new, and although the waterwheel could not be removed without destroying the penstock. *Ib.*

3. A conditional vendor does not waive his lien by taking a mortgage of the same and other property as "further security." *Ib.*

5. Nor is the foreclosure of a mortgage which secured that and other indebtedness a satisfaction of the lien where it appears that the proceeds of the foreclosure did not liquidate the entire indebtedness. *Ib.*

5. The statute of limitations does not run against a conditional vendor until there is an adverse possession by the vendee. *Ib.*

6. Where the purchaser of a farm goes into possession under contract with the owner that certain specified payments shall be made, and that until so made all the products of the farm shall be the property of the owner, who may at any time take possession of the same upon breach of the conditions of the contract, the making of the payments is a condition precedent to the acquiring of any title to such products by the purchaser. *McCole* v. *Varnum*, 163.

7. If upon breach of the conditions the owner actually takes possession of the farm and products, the same are not attachable upon the debts of the purchaser, although he is still temporarily living upon the farm. *Ib.*

CONSENT TO ARREST. *See* EXCEPTIONS 8.

CONSIDERATION.

1. The plaintiff held a certificate of deposit against a national bank of which the defendant was a director, and applied for payment upon the same. The bank then had funds sufficient for the payment of the certificate and was engaged in its regular business, but was in fact insolvent. The officers of the bank requested the plaintiff not to draw out his money upon the certificate but to leave it in the bank. To this the plaintiff consented upon condition that the defendant would sign the certificate. Thereupon the old certificate was surrendered, the one in suit issued, signed by the defendant upon the back, and the plaintiff forebore to call for the money until the bank passed into the hands of a receiver. *Held*, that upon the above facts there was a good consideration for the defendant's promise. *Ballard* v. *Burton*, 387.

2. It is immaterial that no definite time of forbearance was fixed, provided the plaintiff did in fact forbear a reasonable time. *Ib.*

3. Nor is the plaintiff's right of recovery affected by the fact that under the laws of the United States applicable to banks a payment to him at the

time he called for his money would have been void as a preference, and might have been recovered by the assignee. *Ib.*

4. The waiver of a legal right upon request is a good consideration though the promissee loses nothing. *Ib.*

CONSTRUCTION OF WILL. *See* EQUITY 3, 4, 6, 7, 8.

CONSTRUCTION OF REPORT. *See* INSOLVENCY 1, 4.

CONSTRUCTION OF AGREEMENT. *See* CONTRACT 1, 2.

CONSTRUCTION.

1. Where words of particular designation are followed by those of general import, the latter include only things similar in character to those specially named. *Cross* v. *Frost*, 179.

2. Where a deed provided that the grantor should not put upon the premises "any buildings, timbers, trees, or other nuisances," the words "other nuisances" will not include excavations, unless it appears from the whole instrument that such was the intention. *Ib.*

3. *Held*, that no such intention could be inferred from the deed and circumstances in this case. *Ib.*

CONSTRUCTION OF STATUTES.

1. In construing a statute the trend of previous legislation upon the same subject-matter may be considered to ascertain the intent of the legislature. *Baker, Apt.* v. *Jacobs*, 197.

2. In construing a statute the court should consider, first, the language of the act taken as a whole; second, the application of that language to existing circumstances and necessities. *Legg, Jr., Admr.* v. *Britton*, 652.

3. In the construction of statutes the intention of the law-giver, when accurately ascertained, will prevail over the literal sense of terms. *Adams* v. *Sleeper*, 544.

CONTEMPT OF COURT.

The judge of the Bennington Municipal Court may imprison for contempt a witness who refuses to answer a question properly put to him in a proceeding of which that court has jurisdiction. *Rudd* v. *Darling*, 456.

CONTRACT TO SELL. *See* CONDITIONAL SALE 6.

CONTRACT.

1. *Held*, that the declaration sufficiently alleged that the defendants promised for themselves, and not for the corporation in which they were stockholders. *Curtis* v. *Watson & Voodry*, 536.

2. Also that upon the facts set forth the plaintiff was entitled to a conveyance to himself upon offer of the purchase price, and that it was immaterial whether he sold it to others. *Ib.*

3. The plaintiff's declaration alleged that the defendant, being a large stockhelder in that company, promised in writing to pay him the sum of two thousand dollars provided he would "do work and sell for Woodbury Granite Co. the lands and property of same for the sum of thirty thousand dollars;" that he did sell the property for that price to one Viall, notify the defendant thereof and request him to cause said property to be conveyed to said Viall, but that the defendant thereupon notified the plaintiff that the said property would not be conveyed by the said Woodbury Granite Co., and that the defendant would not accept said sum of thirty thousand dollars for the same. *Held*, that no cause of action was disclosed, for that a "sale" included not only the finding of a purchaser, but the procuring of a conveyance from the company. *Curtis* v. *Watson*, 549.

See FRAUDULENT AGREEMENT 1, 2; HUSBAND AND WIFE 12, 13.

CONTRIBUTORY NEGLIGENCE. *See* MASTER AND SERVANT 5.

COSTS.

1. The suit being a friendly one, no costs are allowed. *Morse, Exr.* v. *Lyman et al.*, 167.

2. Costs were allowed the defendant who appealed. *Blair, Admr.* v. *Johnson's Heirs*, 598.

See PRACTICE 2, 3, 4, 5; OFFICER 1, 2; TENDER 1.

COUNSEL. *See* TRIAL 8.

COUNTY COURT.

1. The County Court for the county of Windsor may be adjourned from the court house to the residenc of one of the assistant judges in Woodstock. *Bates* v. *Sabin*, 511.

2. The presiding judge alone may make such adjournment if the two assistant judges are disqualified from acting. *Ib.*

CRIMINAL LAW.

1. At common law the body of an indictment cannot be amended, but an informatien may be even after plea filed. *State* v. *White*, 372.

2. The common law is in force in this State in that respect, notwithstanding that our statutes couple indictments with informations in permitting certain amendments. *Ib.*

3. Where personal property is stolen from the possession of a railroad company, by whom it is being transported as baggage, the ownership is properly laid in such company. *State* v. *Casavant*, 405.

CRIMES AND OFFENCES.

1. A complaint setting forth that the respondent "did disturb and break the public peace by tumultuous and offensive carriage, by firing guns,

blowing horns, and beating tin pans," charges an offence under R. L. s. 4228. *State* v. *Coffin*, 25.

2. Because these acts are punishable under R. L. s. 4234 when done in the night time, it does not follow that they may not under some circumstances amount to a breach of the peace in the day time. *Ib.*

CROSSING. *See* RAILROAD COMPANIES 10, 11.

CROSS-BILL. *See* EQUITY 2.

CULVERT. *See* HIGHWAYS AND BRIDGES 3.

DAMAGES.

1. If the defendant has been actuated by malice, that may be considered by the jury upon the question of exemplary damages. *Banister* v. *Wakeman*, 203.

2. The plaintiff having received back the property converted, an instruction that the measure of damages would be the difference in value when converted and when returned is sufficiently favorable to the defendant. *Stillwell* v. *Farewell*, 286.

3. In an action for the alienation of the wife's affections, the value of the wife's services is not the true rule of damages. *Rudd* v. *Rounds*, 432.

4. In an action for false imprisonment the plaintiff may recover as damages the amount of a tax paid by him to obtain his release from restraint under an illegal tax warrant,although the tax itself was a valid one against the plaintiff. *Taylor* v. *Coolidge*, 506.

5. Interest was not recoverable *eo nomine* as matter of law, and the court having directed a verdict for the amount paid, with interest, the judgment of the County Court will be reversed, and judgment given for the amount paid, without interest. *Ib.*

See WATERS 1, 2; RAILROAD COMPANIES 7, 8, 10, 11, 12, 15; TRUSTEE PROCESS 2, 3; EVIDENCE 49, 52.

DEATH FROM WRONGFUL ACT.

1. An administrator may join a count for damages done his intestate in life by the neglect of the defendant with a count for damages accruing to the widow and next of kin by the death of the intestate also resulting from the negligence of the defendant. *Ranney, Admr.* v. *St. J. & L. C. Rd. Co.* 277.

2. R. L. s. 2138, providing for the recovery of damages for the benefit of the widow and next of kin, where death results from the neglect or default of a person, does not create a new and additional cause of action in favor of such beneficiaries, but provides for the recovery of a new class of damages in case a right of action would have existed in the deceased person if living. *Legg, Jr., Admr.* v *Britton*, 652.

3. Hence, if this right of action be extinguished in the lifetime of the

injured person, as by a settlement or recovery, no further recovery can be had after his death. *Ib.*

4. And where the injured person began a suit in his lifetime which his administrator prosecuted to judgment after his death, such judgment will bar a second suit for the benefit of the widow, although the damages awarded in the first suit were solely for the injuries to the deceased person in his lifetime. *Ib.*

DECLARATION. *See* PLEADING 11, 12, 13, 14, 15, 16; EVIDENCE 35, 36, 37, 48.

DECREE.

The orator should have decree for a re-conveyance of the property unless, within a given time, the defendants pay the balance due on the note with costs. *Randall's Admr.* v. *Randall et al.*, 419.

See FORECLOSURE.

DEED. *See* EVIDENCE 56, 59; CONSTRUCTION 1, 28.

DEFAULT. *See* TRUSTEE PROCESS 4.

DELIVERY. *See* SALE 1, 2, 3, 4.

DEMAND.

No other demand or notice was required to charge the defendant as a maker than a return of the certificate properly endorsed to the receiver. *Ballard* v. *Burton*, 387.

See CHATTEL MORTGAGE 2.

DEMAND AND NOTICE. *See* NOTES AND BILLS 2.

DEMURRER. *See* PLEADING 9, 10, 17; INTOXICATING LIQUOR 7.

DEPOSIT. *See* TRUSTS 8.

DISCHARGE. *See* CHATTEL MORTGAGE 8, 9, 10.

DISCLOSURE.

Where a person has been arrested and brought before a justice for being found so intoxicated as to disturb the public peace, and has been ordered to disclose without protest on his part, it is no objection to the legality of a subsequent commitment for an insufficient disclosure that the justice did not, before requiring the disclosure, announce that he had found that the respondent was so intoxicated as to disturb the public peace, if in fact he had made such finding. *Re* LUCIUS IRISH, 376.

DIVORCE. *See* MARRIAGE AND DIVORCE 1, 2, 3.

DOUBLE-DEADWOODS. *See* MASTER AND SERVANT 1.

DOWER. *See* TENANT IN DOWER 1.

DUPLICITY. *See* PLEADING 1, 2.

DWELLING. *See* INTOXICATING LIQUOR 3.

EJECTMENT.

Held, that upon the facts in this case the plaintiffs had no title upon which they could maintain ejectment against the defendant. *Wheeler et al.* v. *School Dist. No. 13 in Barre*, 184.

EQUITY.

1. Equity will enjoin the successors by mortgage to the original railroad company from setting out the fences to the surveyed limits and thereby taking the owner's land and interfering with his use of a spring. *Croft* v. *Croft*, 1.

2. Where, upon a petition to foreclose a mortgage, the master finds that, after deducting the usury embraced in the mortgage notes, the orator has been overpaid, the defendant may, upon the filing of a cross-bill, have decree for the amount of such overpayment. *Hathaway* v. *Hagan*, 135.

3. A Court of Equity will not, if it has the jurisdiction, which is doubted, construe a will as to future and uncertain contingencies; but only when such construction is needed to direct the executor as to some present act. *Morse, Exr.* v. *Lyman et al.*, 167.

4. The will directed that the income of certain property should be paid to certain legatees for a given time, and that at the expiration of that time the principal fund should be distributed. *Held*, that, no question arising as to the division of the income, a bill would not lie for a construction of the will as to the proper distribution of the principal, until at least the time for such distribution arrived. *Ib.*

5. In the event of the death of one of the legatees before a certain period, his share of the principal fund was payable to the American Board of Foreign Missions. *Held*, that the society would be a necessary party to a suit for a construction of the will as to the distribution of the principal fund. *Ib.*

6. An orator must stand upon the allegations in his bill, and an allegation in an answer, not responsive to the bill, is not an element in the case. *Blair, Admr.* v. *Johnson's Heirs*, 598.

7. The jurisdiction of the Court of Chancery in the settlement of the estates of deceased persons is not original, but special and limited, and only in aid of the Probate Court when the powers of that court are inadequate. *Ib.*

8. Where by the terms of the will the wife confessedly has the right to use the entire estate if necessary for her support, the court will not entertain a bill to determine whether she takes an estate for life or in fee, so long as she is in fact using the property merely for her support. *Ib.*

9. The Court of Chancery may, in its discretion, enjoin the cutting of timber upon premises which the orator alleges belong to him, before his title to the same has been established in a court of law. *Griffith* v. *Hilliard*, 643.

10. If it appears from the answer that the title is in controversy, the court may order the orator to try that question in a court of law, continuing the temporary injunction meanwhile. *Ib.*

11. Still later L. obtained a decree of foreclosure against the husband alone for the entire amount paid by him to R., and this the orator bought in to protect itself. *Held*, that the orator thereby obtained no greater right against the wife than L. had. *Brighton v. Doyle*, 616.

See RAILROAD COMPANIES 6; EVIDENCE 6; INTERPLEADER 1, 2, 3; COSTS 1; HUSBAND AND WIFE 6; PRIORITY OF LIENS, 1, 2, 3, 4, 5, 6.

ERROR.

1. It was not error to refuse to instruct the jury as to the common law definition of a dwelling, they being correctly told what the word meant in the statute. *State* v. *Camp*, 295.

2. Error cannot be predicated upon the reception by a special master of evidence bearing solely upon an issue not involved in the decision of the court. *Williams, Admr.* v. *Wager et al.*, 326.

3. When an exception is to the charge of the court as given, and the error insisted upon is, not that the charge as actually given was erroneous, but that the court should have gone further, the exception will not be sustained, if it would have been the duty of the court in other parts of the charge to supply the claimed omission, and it does not affirmatively appear that the court failed to do so. *State* v. *Bradley*, 466.

4. Sickness is a legal disqualification; and where the exceptions state that one assistant judge was confined to his house by ill health and that the other was absent, error in making the adjournment does not affirmatively appear, for it is the duty of the assistant judge to be present unless disqualified, and the presumption is that he does his duty. *Bates* v *Sabin*, 511.

5. The auditor reported, in respect to certain items which he allowed the plaintiff, that they were for services performed on Sunday. *Held*, that the allowance by the auditor would not be set aside in Supreme Court since it did not affirmatively appear that the service was performed before sunset on Sunday nor that it was not a work of charity or necessity.

6. The auditor not having been requested to report what method he used in the computation of interest, the judgment of the County Court accepting the report will not be reversed, because it does not appear from the report what method he adopted nor how he could arrive at the result in respect of interest which he did. *Ib.*

7. Error cannot be predicated upon the exclusion of a question merely; it must appear what the answer would have been and that its exclusion was erroneous. *Roach* v. *Caldbeck*, 593.

See PRACTICE 11; EVIDENCE 44.

ESTATE OF DECEASED PERSONS. *See* PROBATE COURT 1, 2,

ESTOPPEL. *See* MORTGAGE 6.

EVIDENCE.

1. The question being upon the value of a mastiff bitch used for breeding purposes, evidence is properly received as to the elements of value in such a dog and as to her pedigree. *Winchell* v. *National Express Co.*, 15.

2. Plaintiff sought to recover for injuries done his dog, while being transported by the defendant from the plaintiff's residence to its office in Fair Haven, whence it was to be forwarded by rail. Defendant denied that its agent had authority to receive expressage elsewhere than at its office Thereupon the plaintiff claimed that the defendant had suffered the agent to hold himself out to the world in that capacity to such an extent that he might rely npon it; and introduced evidence tending to show that the agent used a wagon lettered with the defendant's name to the knowledge of the defendant in the collection of express parcels. *Held*, that it was not permissible to show that the agent used this wagon about his own business, unless such use was brought home to the plaintiff. *Ib.*

3. But the defendant might show that the agent has used the wagon in doing other than express work for the plaintiff himself. *Ib.*

4. Upon the question whether the agent had notified the plaintiff that dogs were sent at the owner's risk, it would have been proper to show that at the time of the pretended notification there was in the office at Fair Haven a book of instructions, one rule of which required such notice to be given, but since the time was not so limited the question was properly excluded. *Ib.*

5. When the description in a deed refers to two or more objects, parol evidence is admissible to show which object was meant. *Wead* v. *St. J. & L. C. Rd. Co.*, 52.

6. The defendant claimed title by virtue of subsequent conveyances under a deed from the orator and others dated March 29, 1882. In this and the later deeds the orator's east line was described as the east line of the highway. For many years before, the east line of the highway at that point as occupied, worked and fenced was in a certain place. In 1845 the highway was re-surveyed and the easterly line established in a different place. *Held*, that parol evidence was admissible to show that in fact the east line of the highway as fenced and occupied was never changed in consequence of the re-survey, and that the parties to the deeds through which the defendant claimed, including the railroad company which had originally constructed the road, had always treated the line as fenced as the eastern boundary of the orator's land. *Ib.*

7. Writings offered as evidence will not be excluded because they were improperly obtained. *State* v. *Mathers*, 101.

8. The respondent wrote a criminatory letter to his wife and intrusted it to his daughter for delivery. It was taken from her pocket and offered in evidence. *Held*, admissible. *Ib.*

9. L. was the owner of a saw-mill and the plaintiff's firm furnished him money with which to operate it. L. bought the logs in the name of the plaintiff's firm, and the lumber was sold and the collections made by that firm. The plaintiff's firm also bought for and delivered to L. a water-wheel and other machinery which L. put into and used in connection with said mill. The plaintiff's deceased partner managed the business and there was no direct evidence to show the terms under which L. took and held this machinery. *Held*, that the fact that the plaintiff's firm charged L. with the purchase price upon its books and that L. credited the plaintiff's firm with the purchase upon his books tended to show a sale, and that the circumstances of the case, together with the plaintiff's evidence that his firm took special pains to keep title to all the property which they bought for L., warranted a finding by the referee that this was a conditional sale. *Page* v. *Edwards*, 124.

10. For the purpose of proving want of mental capacity the contestants introduced evidence tending to show that the testatrix had many insane delusions, and that among other things she continually accused her husband of improper conduct with other women. *Held*, that the proponents might show in rebuttal what the conduct and reputation of the husband in this respect was, so far as it was known to the testatrix. *Foster's Ex'rs* v. *Dickerson et al.*, 233.

11. A witness, not an expert, may give an opinion as to the insanity of a person, based upon conversations or dealings had with that person; and that such conversations or dealings have been limited in extent, goes not to the admissibility, but to the weight of the evidence. *Ib.*

12. A non-expert witness, testifying from facts within his own observation, may give an opinion as to the sanity of the person whose capacity is on trial, notwithstanding that is the very question for the jury, and an expert witness may do the same, although he bases that opinion upon facts testified to by others. *Ib.*

13. A witness, who had had great experience in nursing and caring for the insane, having testified that she had seen and conversed with the intestate for an hour at a time on two or three different occasions, and that there was nothing in her manner to indicate impairment of mind, may be further asked the question, "Do you think you could have seen and conversed with Mrs. Foster an hour and a half as you conversed with her, and not have discovered any insanity if any existed in her?" as against the objection of the contestants that it was leading and that the proper foundation had not been laid for it. *Ib.*

14. Where witnesses testify that they, from their conversations with the intestate regarded her as insane, they may be asked upon cross-exanination what the statements upon which they base their opinions were. *Ib.*

15. A witness for the proponent having testified that the intestate gave

a deposition before him and that she appeared sane, it is not competent for the contestants to prove that other persons, while inmates of an insane asylum, have given intelligent depositions and been permitted to testify in court. *Ib.*

16. A former attorney testified that from his transactions with the testatrix he considered her insane and that one of these transactions was the drawing of a petition to the Probate Court which was at the time read to her. *Held*, that the petition was admissible.

17. For the purpose of showing the feelings of the testatrix towards her relatives, and as bearing, therefore, upon the question of undue influence, letters written by the testatrix, and those written by her relatives, the contents of which must have been known to her are admissible. *Ib.*

18. The writer of such a letter may explain the circumstances under which is was written, and the meaning which she intended to convey. *Ib.*

19. *Held*, that the court correctly instructed the jury as to the bearing of the subsequent declarations of the testatrix, upon the issues of testamentary capacity and undue influence. *Ib.*

20. The action being trover for the conversion of a horse by driving it beyond the limit of the original bailment, an entry upon the plaintiff's book made at the time is not original evidence of the terms of the bailment, but at most is only corroborative as a memorandum to assist the plaintiff's memory, and should only be submitted to the jury with this restriction from the court. *Stillwell* v. *Farewell*, 286.

21. The plaintiff claimed that the horse had been misused on the trip. The defendant insisted that he drove it properly, and sought to prove this by the testimony of himself and one Allen who rode with him. *Held*, that the plaintiff might properly show that the defendant was intoxicated, as tending to establish his misuse of the horse, and might show the same fact as to Allen after he was improved as a witness. *Ib.*

22. Allen having testified that he drank nothing that day but beer, the plaintiff might be permitted to ask him on cross-examination if two days after he did not offer alcohol to another person, saying it was some left from this occasion. *Ib.*

23. The plaintiff testified upon direct examination that the horse was worthless when returned. Upon cross-examination he said that he had subsequently traded him off. *Held*, that upon re-examination he might further state what he received for the horse and what he had previously expended upon it. *Ib.*

24. The evidence of the defendant tended to show that the horse was permanently lame before he hired it. *Held*, that the plaintiff might show the contrary in rebuttal. *Ib.*

25. A legatee under a will is not thereby rendered incompetent as a witness to the capacity of the testator. *Re Emma C. Buckman's Will*, 313.

26. A husband after the death of his wife may testify for or against her estate as to all matters not confidential and not affecting her character. *Ib.*

27. Conversations between them in the presence of witnesses in respect to their respective interests in certain real estate the title to which stood in the wife are not confidential. *Ib.*

28. The question being upon the probate of a will, evidence that the testatrix had devised property not her own is admissible as tending to show want of testamentary capacity and undue influence. *Ib.*

29. Evidence of an agreement as to the ownership of property devised only puts that agreement in issue collaterally, and one party may testify in his own favor although the other is dead. *Ib.*

30. A witness may give an opinion as to the rental value of a house, or what it is worth to board a certain person, provided he has a sufficient knowledge of the premises to render him competent. *Maughan* v. *Burns' Est.*, 316.

31. A witness may refer to a memorandum made at the time of a transaction for the purpose of refreshing his recollection, and such memorandum is itself admissible in connection with the witness's testimony. *Williams, Admr.* v. *Wager et al.*, 326.

32. Her husband might properly testify in behalf of the oratrix to matters in which he did not act as her agent, unless objection was made thereto for that he was her husband. *Held*, that the objection interposed in this case to his testimony was not upon that ground. *Johnson* v. *Valido Marble Co.*, 337.

33. He might so testify that the insurance money drawn from the bank upon the blank checks of the oratrix was used for the benefit of the Valido Company without producing the checks. *Ib.*

34. The plaintiff was properly allowed to testify that he would not have left his money in the bank had he not understood that the defendant was obligated to pay it. *Ballard* v. *Burton*, 387.

35. The action being for the alienation of the affections of the plaintiff's wife whereby she was induced to and did abandon the plaintiff and refuse to live with him, the defendant may show what the wife said when leaving her husband's house, and while on her way to the house where the defendant was stopping, some eight miles distant, and to the defendant upon arriving there, when he advised her to return to her husband, for all this is a part of the *res gestae*. *Rudd* v. *Rounds*, 432.

36. He may also show that the wife had become embittered towards the plaintiff before this in consequence of his cruel treatment of her, and had entered a complaint against him for an assault upon her. *Ib.*

37. Also that the wife's mother had written the plaintiff a letter accusing him of ill-treating her daughter, that the plaintiff made no reply to this, and after receiving it refused to speak to the mother. *Ib.*

38. The plaintiff was properly permitted to testify that on several occasions he invited his wife to go to the village with him, and that she refused and afterwards went with the defendant. *Ib.*

39. The defendant proposed to ask the plaintiff on cross-examination, "Didn't you tell her, your wife, that you were using oil of cubebs for a trouble you had," referring to the claim of the defendant that the plaintiff had contracted a bad disorder in a house of ill-fame. *Held*, rightly excluded as calling for immaterial matter. *Ib.*

40. Upon a trial for murder a witness, not an expert, may be properly asked what the appearance of the respondent was when charged with the crime and denying the charge. *State* v. *Bradley*, 466.

41. And if in answer to the accusation the respondent says that the deceased died of heart disease, when in fact she died of a stab in the heart, that may be shown. *Ib.*

42. Evidence that the respondent threatened to kill the deceased upon condition, is admissible when accompanied by proof that the condition has happened, although such threats were made six or eight months before the killing. *Ib.*

43. The injury complained of was occasioned by the falling of the plaintiff's horse over an embankment wall, which he claimed was a part of the approaches to the bridge. This the defendant denied and insisted that it was a retaining wall rendered necessary by the construction of another highway to connect with the one which originally crossed the stream at this point. *Held*, that the defendant should have been permitted to ask of witnesses long acquainted with the locality what part of the support of the bridge or of the filling of the abutment was made by the bank wall at the place of the accident. *Tinkham et al.* v. *Stockbridge*, 480.

44. Nor would the error occasioned by the exclusion of this evidence be cured by the fact that a photograph of the locality was exhibited to the jury. *Ib.*

45. The claim of the defendant being that the note in suit had been obtained by fraudulent representations upon the part of the payee to the effect that it was not a note but a contract, *held*, that evidence of similar fraudulent transactions was admissible upon the question of intent. *McCasper & Mallow* v. *Enright*, 488.

46. Memorandum books, though not independent evidence, are admissible in connection with the testimony of the one who kept them. *Bates* v. *Sabin*, 511.

47. Declarations of the father made after the deposit that the money was still his are inadmissible. *Conn. River Savings Bank* v. *Albee et al.*, 571.

48. But his declarations that the deposit was for the benefit of his son are. *Ib.*

49. In an action for assault and battery evidence of the pecuniary ability of the defendant is not admissible upon the question of actual damages. *Roach* v. *Calbceck*, 593.

50. In such an action evidence of the relations of the parties at the time of the assault is admissible, but evidence of past controversies is not, although they may have lead up to the affray. *Ib.*

51. It was error to permit the plaintiff to show that the defendant entered a complaint against him for intoxication directly after the assault. *Ib.*

52. Evidence that the defendant has been criminally prosecuted and paid a fine for the same assault is not admissible upon the question of exemplary damages. *Ib.*

53. When the testimony of a witness is attacked only by showing its improbability, and by other testimony conflicting with it, sustaining testimony that the witness bears a good reputation for truth and veracity is not admissible. *Stevenson* v. *Gunning's Estate*, 601.

54. If one party has raised an issue by the introduction of evidence upon his side, he cannot afterwards object to the admission of evidence offered by his adversary upon the same issue for the reason that such issue is not strictly material. *Ib.*

55. The maker of the note having deceased, it was error to receive in evidence his will, executed after the date of the note, and the statement of his affairs made to the one who drew the will at the time it was drawn. *Ib.*

56. The plaintiff could not properly testify in contradiction of the executor upon an immaterial matter drawn out by the plaintiff upon cross-examination, although transpiring subsequent to the decease of the intestate. *Ib.*

57. One defence to the note was want of consideration. As tending to show where he obtained the money for which it was given, the plaintiff gave evidence that about 1859 he began to work for his father under an arrangement that he was to have $100 a year, and that in 1869 his father had accumulated a considerable sum which afterwards came to him. *Held*, the grand lists of the father and son for the year 1869, showing that neither the father nor son were taxed for personal property, but upon the contrary claimed to be owing would be admissible, but, *quere*, without holding it reversible error, could the further fact that the plaintiff stood by without objection while the father gave in his inventory be shown, and did not the court give this testimony too much prominence by assuming that the inventories were then signed and sworn to as at present.

58. He might also testify that he received the checks for the insurance money from the oratrix as the manager and in behalf of the Valido Company, and not as her agent. *Johnson* v. *Valido Marble Co.*, 337.

59. Where the description in a deed is mostly by courses and distances, which when applied to the premises, will not coincide exactly with the monuments given, nor return to the point of beginning, oral evidence is admissible to explain the ambiguity. *Rugg and Wife* v. *Ward*, 402.

See HUSBAND AND WIFE 1, 11; INTOXICATING LIQUOR 4; WITNESS 4, 5, 9; LIBEL 5.

EXCEPTIONS.

1. Exceptions taken on the trial below but not urged by the exceptant in this court, were not considered. *Paine* v. *Webster*, 105.

2. By introducing evidence upon his part, the defendant waives an exception to the action of the court in overruling his motion for a verdict made at the close of the plaintiff's case. *Noyes, French & Fickett* v. *Parker*, 379.

3. It appeared that the defendant arrested the plaintiff upon a tax warrant and transported him to Woodstock for the purpose of committing him to jail, whereupon the plaintiff paid the tax and was set at liberty. Upon the trial the court said that unless there was some question which the parties desired to present to the jury, he would hold the warrant illegal and direct a verdict for the plaintiff. *Held*, that the defendant, having made no claim in that respect then, could not in Supreme Court insist that the question whether the plaintiff consented to the arrest should have been submitted to the jury. *Taylor* v. *Coolidge*, 506.

4. Where the stenographic transcript of the trial is referred to by the exceptions for certain purposes, it is before the Supreme Court only in those particulars. *Roach* v. *Caldbeck*, 593.

See PRACTICE 19; ERROR 3, 4, 5; HIGHWAYS AND BRIDGES 8.

EXECUTORS AND ADMINISTRATORS.

1. An administrator cannot contract a debt against the estate which he is administering. *Rich's Exrs.* v. *Soules, Admr.*, 408.

2. If a writ and declaration run against A, administrator of B's estate, the writ is against A personally, and not against the estate, for the words "administrator of B's estate" are merely *descriptio personae* and might be rejected as surplusage. *Ib.*

3. So a judgment, following such a writ and declaration, against A "as administrator," is not a judgment against the estate, but against A personally. *Ib.*

EXECUTION.

The purchaser of real estate at an execution sale is not entitled to the rent thereof during the six months allowed the debtor for redeeming the same, under No. 139, 1884. *Sowles* v. *Hanley*, 412.

EXEMPLARY DAMAGES. *See* DAMAGES 1.

EXPERT. *See* EVIDENCE 11; PRACTICE 11; WITNESS 10.

FALSE IMPRISONMENT.

Evidence of an arrest and restraint upon an illegal warrant will support an action for false imprisonment, although there is in fact no commitment to or confinement in jail. *Taylor* v. *Coolidge*, 506.

FEES. *See* OFFICER 1, 2.

FENCES. *See* RAILROAD COMPANIES 4, 5.

FORBEARANCE. *See* CONSIDERATION 1, 2, 3, 4.

FORECLOSURE.

The defendant town conveyed certain lands to the plaintiff by deed warranty, taking back a mortgage for the purchase price. Subsequently this mortgage was foreclosed and a decree obtained. Before the decree became absolute the defendant voted, but without any sufficient article in the warning, to extend the time of redemption six months. Before the expiration of this six months, but after the decree would have become absolute by its original terms, the defendant voted, at a meeting duly warned, to give the plaintiff a quit-claim deed upon his paying a sum less than that due on the decree, which was done. *Held*, that the first vote to extend the time of redemption, although invalid by reason of the insufficient warning, would have entitled the plaintiff to have the decree opened; that the decree never became absolute, and that the covenants in the original deed were still in force. *Daggett* v. *Town of Mendon*, 323.

FOREIGN CARS. *See* MASTER AND SERVANT 1.

FORMER ADJUDICATION.

The orator brought suit to restrain the defendant from obstructing a watercourse whereby the water was set back upon his meadow, and alleged that in a former suit at law the same question had been determined in his favor. It was found that this suit and the suit at law were for substantially the same cause of action. *Held*, that this finding was conclusive of the right of the orator against the defendant. *Ames* v. *Dorset Marble Co. et al.*, 10.

FRAUDULENT AGREEMENT.

1. The court will not enforce the performance of a fraudulent agreement for the payment of money, nor will it assist one paying money under such an agreement to recover the amount so paid. *McEwen* v. *Shannon & Co.*, 583.

2. Where several persons for the purpose of inducing each other to have their cream manufactured into butter at a certain place, mutually agree to pay a certain price per pound for this service, a secret agreement between one of these persons and the company, which is to do the manufacturing, that the cream of that person shall be manufactured for a less price is fraudulent. *Ib.*

FRAUD. *See* EVIDENCE 45; FRAUDULENT AGREEMENT 1, 2.

FRAUDS, STATUTE OF.

The defendant being indebted to C, and C being indebted to the plaintiff, it was agreed between the three that the plaintiff should discharge C and that the defendant should pay the plaintiff the amount which he owed C. *Held*, that this promise of the defendant was an original one and not within the statute of frauds. *Bates* v. *Sabin*, 511.

FRAUDULENT CONVEYANCE. *See* DECREE 1.

GOOD FAITH. *See* TENDER 3.

GRAND LIST.

The fact that the sole property of the wife is set in the list to herself and her husband jointly does not render the list void as against her. *Adams* v. *Sleeper*, 544.

HARMLESS ERROR.

1. Judgment will not be reversed for an error beneficial to the excepting party. *Foster's Exrs.* v. *Dickerson*, 233.

2. A judgment will not be reversed for the introduction of evidence which could not have harmed the excepting party. *Maughan* v. *Burns' Estate*, 316.

See TRIAL 2, 3.

HIGHWAYS AND BRIDGES.

1. Under No. 16, Acts of 1886, amending No. 18, Acts of 1884, which related to the maintenance of highways and bridges by towns benefited thereby, no town can be compelled to contribute to the expense of maintaining a highway or bridge not wholly or in part within its limits. The only effect of that act is to provide a method by which towns already assessed for such contribution can have that assessment vacated. *Underhill* v. *Essex et al.*, 28.

2. No vested right was created by a judgment under the law as it formerly stood assessing a town for a portion of the expense of maintaining a highway or bridge not within its limits. *Strafford* v. *Sharon*, 61 Vt. 126, so far as it rests upon this ground, criticized. *Ib.*

3. A hole in the highway at a point five rods distant from a culvert, which is occasioned by the fact that the culvert is not large enough to carry off the water, is not a defect in a bridge, sluice or culvert for which the town is responsible to a person injured thereby. *Ford* v. *Braintree*, 144.

4. Whatever is necessary to connect the structure which spans a stream and the abutments on which it rests with the highway built on solid ground, and make that structure accessible and useful as a part of the highway, is a part of the bridge. *Tinkham et al.* v. *Stockbridge*, 480.

5. The declaration alleged that the bridge was defective in that there was a high wall extending about fifty feet from end of the bridge, and that

there was no sufficient guard on said abutment or approach. The notice set forth that the horses ran onto the abutment of the bridge, and for want of a guard thereon one of them went off the first abutment about five feet from the end of the bridge. *Held*, that the notice supported the declaration, it appearing from other evidence in the case that the wooden structure of the bridge extended some distance beyond the abutment proper. *Ib.*

6. *Held*, further, that the notice was sufficient, for that the selectmen, with it in hand, could have found without difficulty the place. *Ib.*

7. Where a public highway is laid out over a private road in such manner as to convert the private into a public thoroughfare, the land owner is not entitled to recover as damages the expense of constructing the private road, but simply such damage as is actually done him by the taking, notwithstanding that the public has the benefit of his labor. *Prince et al.*, v. *Braintree*, 540.

8. Where commissioners appointed by the County Court upon the laying out of a highway, report certain facts, upon which the County Court gives judgment, the Supreme Court will revise the judgment in so far as it contains errors of law. *Ib.*

See RAILROAD COMPANIES 9.

HUSBAND AND WIFE.

1. A husband is not liable for necessaries furnished his wife who is living apart from him for a justifiable reason, provided she has adequate means of support from other sources; and an ante-nuptial agreement may afford such means. *Hunt* v. *Hayes*, 89.

2. Whether such means are adequate is for the jury. *Ib.*

3. The question being whether the defendant has paid the plaintiff $25, the defendant testified that he gave his wife that sum for that purpose, and left the house; coming in soon after he saw the plaintiff standing beside the table counting some money and heard him say, "it is all right." *Held*, that the defendant's wife was a competent witness to testify that she put the money upon the plaintiff's plate at the table, from whence he took it saying, "all right." *Pierce* v. *Bradford*, 219.

4. Whatever a wife earns by her own labor upon the understanding between herself and husband that it shall be hers will enure to her benefit. *Potter* v. *Admr. Potter et al.*, 298.

5. The fact that such a claim is presented against the estate of a deceased person in the name of the husband does not make it his; it being understood that the wife shall have the benefit of the allowance. *Ib.*

6. And the wife may invoke the aid of a court of equity to restrain the administrator of her husband's estate from conveying away such allowance. *Ib.*

7. The mere fact that the Probate Court, in making the wife her allowance, treated the claim as a part of the husband's estate does not alter the case. *Ib.*

8. How far the wife's property, or its income, shall be subject to the payment of the husband's debts, is a matter of legislative control as a part of the marriage relation. *Niles* v. *Hall*, 453.

9. The fact that the income of the wife's real estate is, at a particular period, liable for certain debts of the husband in virtue of legislative enactment, does not give a creditor, whose debt accrued during that period, any prospective interest in the future income of such estate. *Ib.*

10. Between 1878 and 1883 the products of the wife's real estate were by statute made liable for the husband's debts contracted for family necessaries. By the act of 1884 that liability was removed. *Held*, that a debt for necessaries contracted previous to 1884 could not be enforced against the income of the wife's real estate after the passage of the act of that year. *Ib.*

11. The defendant directed his wife to pay the plaintiff for certain services and the wife did pay him in the presence of her husband. *Held*, that the wife was not a competent witness to this fact, for that in the making of such payment she was not the agent of her husband. *Bates* v. *Sabin*, 511.

12. A married woman is liable for debts contracted about a business which is in fact hers, although conducted in the name of another person as her agent. *Reed* v. *Newcomb & Husband*, 49.

13. If a husband carries on a business as his wife's agent, which he holds out to the world as her business with her knowledge, consent, and approval, she is liable in respect thereto. *Ib.*

See EVIDENCE 8, 26, 27; PRIORITY OF LIENS 5, 6, 7, 8; SLANDER AND LIBEL 1, 2, 3; WITNESS 9; MORTGAGE 8.

INCREASE. *See* CHATTEL MORTGAGE 6, 7.

INDICTMENT. *See* PERJURY 1.

INFANT.

Dictum, that it is impossible to say from the record whether the defendant is liable for necessaries furnished his infant son who was living with the mother. *Hunt* v. *Hayes*, 89.

INFORMATION. *See* CRIMINAL LAW 1, 2.

INJUNCTION. *See* EQUITY 9, 10.

INNUENDO. *See* LIBEL 1.

INSANE ASYLUM.

A person who has been discharged from the insane asylum by the supervisors of the insane, cannot be recommitted under a revocation of that dis-

charge by a single supervisor, although it was a condition of his original release that he might be. *Re* GEORGE W. THORPE, 394.

INSANE PERSON.

Held, that the case showed such a state of facts as enabled the ward to contract for his own support. *Maughan* v. *Burns' Estate*, 316.

INSANITY. *See* INSURANCE.

INSOLVENCY.

1. In a suit by an assignee in insolvency to recover the value of a payment made within four months, a finding by a referee that a debtor was insolvent at the time of the payment, in the sense that his liabilities exceeded his assets, that the debtor intended a preference, and that the payment was received by the defendant having reasonable cause to believe that the debtor was insolvent in the above sense, necessarily imports the further fact that the defendant had reasonable cause to believe that the payment was made in fraud of the insolvent law, and entitles the plaintiff to a recovery. *Lewis & Leach, Assignees* v. *Burlington Savings Bank*, 626.

2. And "contemplation of insolvency" of that kind is the same thing in this respect as actual insolvency. *Ib.*

3. The creditor gave to the defendant a mortgage as a part of the fraudulent preference, and the defendant afterwards and before the bringing of this suit sold the mortgage note for its full face value. *Held*, that the plaintiffs could recover of the defendant the amount received from the sale of this note, but not the value of the mortgaged premises. *Ib.*

4. *Held*, that the evidence as reported by the referee, supported his findings that the creditor was insolvent, that he made the payment intending a preference, and that the defendant received it having reasonable cause to believe that the creditor was insolvent or in contemplation of insolvency. *Ib.*

See MARRIAGE AND DIVORCE 1.

INSURANCE. *See* MORTGAGE 9.

INSTRUCTION. *See* MASTER AND SERVANT 3, 4.

INTENT. *See* EVIDENCE 45.

INTEREST.

It not appearing that the plaintiffs made any demand on the defendant before the commencement of suit, interest should be computed from the date of service. *Lewis & Leach, Assignees* v. *Burlington Savings Bank*, 626.

See NOTES AND BILLS 1, 2; JURISDICTION 1; DAMAGES 5; ERROR 6.

INTERPLEADER.

1. A bill of interpleader will not lie if the orator has any interest in the fund. *Wing, Admr.*, v. *Spaulding et al.*, 83.

2. Where the fund is the amount collected upon a non-negotiable instrument which one of the defendants gave the orator to collect upon the understanding that he should apply whatever was collected upon her indebtedness to him, he has such an interest in the suit that he cannot maintain interpleader. *Ib.*

3. This objection may be urged upon the coming in of a master's report after a trial upon the merits, when there has been no decree of interpleader, and some of the defendants have answered setting up the fact of interest in the orator. *Ib.*

INTOXICATING LIQUOR.

1. One who buys intoxicating liquor with the money of another and takes it to him with intent that it be shared between them, is guilty of an act of furnishing under the statute. *State* v. *Hassett*, 46.

2. *Held*, that the testimony in this case tended to show both a sale and a furnishing, and that the court below properly refused to direct a verdict. *Ib.*

3. Under No. 41, Acts of 1882, it is unlawful to give away intoxicating liquor in one's barn or granary. The words "own private dwelling" apply merely to the building in which one lives, eats, sleeps and entertains his friends. *State* v. *Camp*, 295.

4. The evidence of the State tended to show that the witness went to respondent's house and called for cider; that the respondent invited him into his cellar, told him he had something better than cider, and furnished him with a drink of whiskey; that witness inquired what was to pay and respondent replied nothing, that he kept nothing for sale, whereupon witness threw down a quarter and went away. *Held*, that this evidence tended to show a sale. *Ib.*

5. In order that a person may be convicted of intoxication it is not necessary that he should drink the liquor for the purpose of becoming intoxicated. *State* v. *White*, 372.

6. The seller of intoxicating liquor may recover the purchase price in Vermont if the sale and delivery were in Massachusetts. *Dame & Co.* v. *Flint*, 533.

7. An indictment for intoxication which alleges that the offence was committed on a date more than thirty days before the filing of the indictment in court, is not for that reason bad on demurrer, for the filing of the indictment is not necessarily the commencement of the prosecution. *State* v. *Stevens*, 590.

See AMENDMENT 1, 2.

INTOXICATION. *See* DISCLOSURE; INTOXICATING LIQUOR 7.

IMPEACHMENT. *See* WITNESS 1.

IMMATERIAL ISSUE. *See* CHARGE OF COURT 7; EVIDENCE 54, 55.

JOINDER OF COUNTS.

See PLEADING 4, 5, 6, 7; DEATH FROM WRONGFUL ACT 1.

JUDGMENT. *See* PROBATE COURT 3.

JUDICIAL ACT. *See* JUSTICE OF PEACE 1, 2.

JUDGE.

A judicial officer, acting within his jurisdiction and in a judicial capacity, is not liable in a private action for his judicial acts.

See JUSTICE OF THE PEACE 1, 2, 3, 4.

JURISDICTION.

The plaintiff, defendant and three other towns unite in the common maintenance of a poor farm upon which the paupers of the several towns are supported. The terms of the association provide that in case of a deficit, it shall be borne by the several towns in proportion to the number of weeks during which their paupers have been supported. *Held*, that a third town had no interest in the event of a suit brought by the plaintiff to recover of the defendant the amount of an assessment paid to the association by the plaintiff for the support, upon this farm, of a pauper legally chargeable to the defendant. *Town of Jericho* v. *Town of Underhill*, 362.

See REFERENCE 1.

JUSTICE OF PEACE.

1. A judge is not liable to a civil action for a judicial act, and a justice of the peace is a judge within the application of this rule. *Banister* v. *Wakeman*, 203.

2. The examination of witnesses, the admission or rejection of evidence, and the passing of sentence are all judicial acts. *Ib.*

3. A respondent in a criminal prosecution before a justice has an absolute right of appeal within two hours, and from the moment such appeal is taken the justice has no further jurisdiction in the premises. *Ib.*

4. His acts in making up the record and issuing a mittimus are ministerial acts, for which an action will lie. *Ib.*

See JURISDICTION 1.

LAND DAMAGES. *See* HIGHWAYS AND BRIDGES 7.

LANDLORD AND TENANT.

1. As a general rule the tenant cannot dispute his landlord's title, and the same rule applies to an assignee of the tenant. *Derrick* v. *Luddy, Apt.*, 462.

2. In an action for the recovery of rent the tenant who seeks to deny the title of his landlord must show that the case falls within some exception to the general rule. *Ib.*

3. If the tenant recognizes the title of his landlord and pays him rent, that fact raises a promise between the parties upon which an action in general assumpsit will lie. *Ib.*

LANDS. *See* RAILROAD COMPANIES 1, 2.

LARCENY. *See* CRIMINAL LAW 3.

LEGATEE. *See* EVIDENCE 25.

LIBEL.

1. Where the language of the alleged libel is susceptible of two meanings, in either of which it is actionable *per se*, the plaintiff is confined upon trial to that meaning put upon the words by his innuendo, and the defendant can only justify them in that sense. *Norton* v. *Livingston*, 473.

2. If the language admits of more than one meaning, it is for the jury to say what it means; but it is for the court to determine whether it does admit of more than one meaning, and if not, to say what that meaning is. *Ib.*

3. The meaning of the libel should be gathered from the whole publication, read and understood as people in general would read and understand it. *Ib.*

4. The entire publication was: "Luman P. Norton is the only insurance agent in Vermont who has been convicted in open court of wilful perjury." *Held*, that the word "convicted" could only mean, found guilty by legal decision, and was not susceptible of the meaning, proved guilty or detected in guilt. *Ib.*

5. Upon the cross-examination of the defendant certain subsequent articles in his newspaper were introduced upon the question of malice. It appeared that these articles were written and their publication paid for by one Childs. Thereupon the plaintiff offered to show that there existed a bitter feud between Childs and the plaintiff, and that the plaintiff had published many libellous articles concerning Childs, which provoked these articles. *Held*, not admissible, it not appearing that this feud between Childs and the plaintiff was known to the defendant, nor that Childs instigated the libel in suit. *Ib.*

LIFE INSURANCE.

1. Under a policy of life insurance containing a condition that the insurer shall not be liable if death results from "suicide, sane or insane," there can be no recovery where the assured takes his own life, although he acts in obedience to an insane impulse which has overcome his will. *Billings* v. *Insurance Co.*, 78.

2. In case of death from unexplained cause the presumption is against suicide. *Walcott* v. *Metropolitan Life Ins. Co.*, 221.

3. When a life insurance company seeks to avoid payment of its policy

upon the ground that the death of the insured was caused by his own act, the evidence must affirmatively show that fact. *Ib.*

LIFE SUPPORT. *See* MORTGAGE 3, 4.

LIMITATION, STATUTE OF. *See* MORTGAGE 5.

LIMITATION OF ACTIONS.

1. Questions as to the limitation of actions are determined by the law of forum. *Sisson* v. *Niles*, 449.

2. The provision of R. L. s. 970 that absence of the defendant from the State may interrupt the running of the statute, applies only to absence from the State of Vermont. *Ib.*

3. The statute requiring actions for the recovery of taxes paid under protest to be brought within one year, No. 8, Acts 1884, has no application to a suit for false imprisonment, whereby the payment of the tax was compelled. *Taylor* v. *Coolidge*, 506.

4. In an action of book account one party may credit the other with items, which are proper items of credit, and thereby avoid the operation of the statute of limitations, although the other party claims nothing by reason of such items and insists that they should not be credited to him. *Bates* v. *Sabin*, 511.

5. If a promissory note be attested by the wife of the payee as a witness with the knowledge and consent of the maker, he cannot afterwards object that the same is not a witnessed note within the statute of limitations. *Alexander* v. *Hanley*, 361.

6. An endorsement upon a promissory note, "Paid on this note, March 11, 1882, ten dollars," signed by the maker, is a sufficient written acknowledgment to interrupt the running of the statute of limitations, although no payment was in fact made. *Gay's Estate* v. *Hassom et al.*, 495.

7. And where a wife joined with her husband in a mortgage of her real estate to secure the payment of the note, which was signed by her husband alone, such an acknowledgment by the husband will keep alive the mortgage as against her. *Ib.*

MALICE. *See* MURDER.

MAKER. *See* NOTES AND BILLS 3.

MARRIAGE AND DIVORCE.

1. A discharge in insolvency does not bar a proceeding to enforce a decree for alimony made before the filing of the petition. *Noyes* v. *Hubbard*, 302.

2. A divorce will not be granted for a cause which the libellant knew or ought to have known existed at the time of the marriage. *Caswell* v. *Caswell*, 557.

3. The libellant having married the libellee after he had been convicted

of murder in the second degree, but while his case was pending in the Supreme Court on exceptions, a divorce will not be given upon the ground of his subsequent sentence to the State prison for life. *Ib.*

MARRIED WOMAN. *See* HUSBAND AND WIFE.

MASTER AND SERVANT.

1. A railroad company is liable to its employes to the same extent in respect to foreign cars coming to it from connecting roads as in respect to cars owned by it. *Reynolds* v. *Boston & Maine Rd. Co.*, 66.

2. The use of cars equipped with double deadwoods is not negligence *per se*, so long as they can be coupled with safety by an employe who knows how the coupling should be made and makes it with proper care. *Ib.*

3. A master must instruct his inexperienced servant as to those dangers in an employment, which it requires peculiar skill and knowledge to avoid, which are known to the master and unknown to the servant. *Ib.*

4. The defendant employed the plaintiff as a freight brakeman, knowing that he had no previous experience in this capacity. Most of the cars then being hauled over the defendant's railroad were equipped with single deadwoods, but many were equipped with double deadwoods, and such cars were liable to be found in any of the defendant's trains. In coupling cars equipped with the single deadwoods, the deadwoods do not meet and the arm is extended directly in to the link. With cars equipped with double deadwoods, the deadwoods do meet and the arm of the coupler must be carried above or below. When injured the plaintiff had been in the employ of the defendant some five days, had learned to couple cars equipped with single deadwoods, but had never seen and did not know there was such a thing as a double deadwood. Being called upon to make a coupling between two cars provided with these double deadwoods, he extended his arm for that purpose in the usual manner, when it was caught and crushed between the deadwoods. *Held*, that these facts tended to show negligence upon the part of the defendant in not having properly instructed the plaintiff as to this hazard. *Ib.*

5. *Held*, further, that the plaintiff was not guilty of contributory negligence, as matter of law, in not observing and avoiding the danger as the cars came together; especially since the evidence tended to show that with double deadwoods even, the draw-bars would meet first and be driven back.

MEMORANDUM. *See* EVIDENCE 46.

MENTAL CAPACITY. *See* EVIDENCE 10, 11.

MICROSCOPE. *See* WITNESS 10.

MILL OWNERS. *See* WATERCOURSE 2, 3.

MINISTERIAL ACT. *See* JUSTICE OF PEACE 4.

MODIFICATION.

The defendant was not entitled to an instruction that he could not be made liable unless he drove the horse beyond the point to which he notified the plaintiff he was going upon leaving. The rights of the parties were determined by the contract of bailment, and one party could not modify that by mere notice. *Stillwell* v. *Farewell*, 286.

MORTGAGE.

1. A mortgage subsequent in execution acquires priority by being first recorded, unless there exist some facts or elements which give to the mortgage first in execution a controlling equity. *Beeman* v. *Cooper, et al.*, 305.

2. The fact that the mortgage prior in execution was given for a debt already secured by an attachment upon the same premises would not be such an element. *Ib.*

3. A mortgage given to secure the future life support of the mortgagor will not therefore lose its priority over one given to secure a present debt, unless it affirmatively appears that the mortgagor did not reserve sufficient property for the payment of his then indebtedness. *Ib.*

4. And even if this did appear, the mortgage given to secure the present indebtedness would lose its right to priority if the mortgagee stood by until the consideration for the mortgage for life support had been fully executed. *Ib.*

5. A payment by the mortgagor within fifteen years prevents the running of the statute as to the entire premises, notwithstanding the mortgagor, to the knowledge of the mortgagee, has conveyed a portion of the same to a third party, who has been in the exclusive occupancy thereof for more than fifteen years, without making any payment upon or otherwise recognizing the mortgage debt. *Kendall* v. *Tracy et al.*, 522.

6. In such case the mortgagee is not estopped from asserting his lien by the fact that he has stood by and seen the grantee expend large sums upon the granted portion, it not appearing that the grantee was misled by the mortgagee. *Ib.*

7. Nor is the grantee entitled to betterments, if he knew of the existence of the mortgage when he accepted the conveyance. *Ib.*

8. A husband and wife conveyed to R. by warranty deed, premises, of which the wife was the sole owner, to secure an indebtedness from the husband to R., and R. thereupon executed to the husband a bond conditioned to re-convey the premises to him upon payment of the indebtedness. *Held*, that the security would not cover future advances made to the husband alone. *Brighton* v. *Doyle et al.*, 616.

9. The buildings having been insured in the name of R., but really for the benefit of the mortgagee, any insurance money must be applied by R.

to the payment of the original indebtedness, and not of such further advances. *Ib.*

10. As a part of the original transaction and to secure the same indebtedness a bill of sale was given of certain personal property in which the wife claimed an interest, which was subsequently sold by R. *Held*, that in the absence of any specific directions the proceeds should be applied by him upon the original indebtedness. *I b.*

See EQUITY 2; STATUTE OF LIMITATIONS 2, 3; CHATTEL MORTGAGE 6, 7; PRIORITY OF LIENS 1, 2, 3; INSOLVENCY 3.

MORTGAGE OF PERSONAL PROPERTY. *See* CHATTEL MORTGAGE.

MOTION TO SET ASIDE VERDICT. *See* VERDICT 1.

MOTION IN ARREST.

A motion in arrest of judgment must be heard and determined upon the record alone; and the error so appearing must be such as would render the judgment erroneous notwithstanding the verdict. *Noyes, Frinck & Fickett* v. *Parker*, 379.

MURDER.

Murder in the second degree involves malice, but not premeditation; and an instruction that it wants the elements of both malice and premeditation is erroneous. *State* v. *Bradley*, 466.

NECESSARIES. *See* HUSBAND AND WIFE 1, 2, 10.

NEGLIGENCE.

1. Negligence is ordinarily a mixed question of law and fact; but when the facts are not in dispute and only one inference can be drawn from those facts by a reasonable man, it becomes purely a question of law. *Worthington* v. *Central Vt. Rd. Co.*, 107.

2. For a passenger to be upon the platform of a rapidly moving steam-car is, as matter of law, *prima facie* negligence, and no recovery can be had for an injury which was contributed to by the fact of his being in that position, unless his presence there was excused by the occasion. *Ib.*

3. That all the seats in the car are occupied, and the aisles crowded to that extent that the position of the passenger, standing in the aisle, is one of "positive discomfort to himself and evident annoyance to others," does not excuse a passenger from going upon the platform voluntarily and remaining there while the train is in rapid motion. *Ib.*

See BAILMENT 1, 2.

NEW TRIAL. *See* PRACTICE 20.

NOTES AND BILLS.

1. The endorser of a promissory note bearing annual interest is liable for the interest as it falls due before the maturity of the note. *Mt. Mansfield Hotel Co.* v. *Bailey et al.*, 151.

2. But he must be charged with such liability by demand and notice. *Ib.*

3. By signing his name upon the back of the certificate the defendant became *prima facie* liable as a maker, nor did the addition of the word "surety" alter that presumption. *Ballard* v. *Burton*, 387.

4. The real obligation intended to be assumed by the defendant might be shown provided it was known to the plaintiff when he accepted the certificate. *Ib.*

NOTICE.

Subsequently L, by procurement of the husband, paid R the amount of his claim, including further advances, and took a conveyance from him of the premises. The husband and wife were still in possession. *Held*, that L acquired no better title than R had, and that the rights of the wife were not prejudiced by the fact that she requested him to help them, it not appearing that she knew of the future advances. *Brighton* v. *Doyle et al.*, 616.

See HIGHWAYS AND BRIDGES 5, 6.

NOVATION. *See* FRAUDS, STATUTE OF 1.

OATH. *See* CHATTEL MORTGAGE 1.

OBJECTION. *See* PRACTICE 7, 8.

OFFSET. *See* PRACTICE 6.

OFFICER.

1. An officer's return upon a copy of a writ is a part of such copy, and he may charge for the same by the folio.

2. An officer may take possession of personal property which he has previously attached by copy, if necessary, and in that case may charge a reasonable sum for so doing.

ORDER. *See* PAYMENT 1, 2; ACCEPTANCE 1.

PARTNERSHIP.

One of the defendants made such an agreement with the plaintiff and subsequently and while the agreement was in force formed a partnership with the other defendant. In settlement of subsequent dealings between the plaintiff and the co-partnership, the first named defendant allowed the plaintiff the amount due him under the secret agreement, thus finding a small balance due from the co-partnership, for which a due bill was given. *Held*, that the plaintiff might recover according to the settlement, it not appearing that either the defendant firm or that member of the firm who made the settlement were insolvent. *McEwen* v. *Shannon & Co.*, 583.

See ACCOUNT 1, 2.

PARTY IN INTEREST 6, 7, 8.

PARTIES.

The plaintiff may recover in his individual capacity for material sold by him to the defendant, although the material belonged to an estate of which the plaintiff was the administrator, and although the plaintiff has not accounted to said estate for the same. *Bates* v. *Sabin*, 511.

See EQUITY 5.

PAROL EVIDENCE. *See* EVIDENCE 5, 6.

PAYMENT.

1. It being understood as a part of the contract for the purchase of certain lumber by the plaintiff that the purchase price should be paid by an order on the defendant, the giving of the order by the plaintiff and its acceptance by the defendant would be a payment for the lumber, and would discharge the indebtedness of the defendant to the plaintiff *pro tanto*. *Holmes* v. *Laraway*, 175.

2. The indebtedness so discharged could not be revived without the consent of the defendant. *Ib.*

PAUPER.

1. A person is liable under R. L. s. 2844 for transporting a pauper from one town to another with intent to charge the latter with the pauper's support, even though such latter town is legally chargeable therewith. *Weybridge* v. *Cushman*, 415.

2. *Held*, that upon the defendant's own testimony he was guilty of the offence charged, and that a special verdict to the contrary was against the evidence and should be set aside. *Ib.*

3. Under the pauper law of 1886 the liability of towns for the support of paupers depends upon residence and the question of settlement is immaterial. *Vershire* v. *Hyde Park*, 638.

4. An order had been made removing the pauper from the plaintiff town, and from this order an appeal had been taken which was pending at the time of the passage of the act of 1886. The pauper had not been actually removed but continued to reside in the plaintiff town, and never resided in the defendant town. The support sued for was subsequent to July 6, 1888. *Held*, that the affirmance of the order of removal by the County Court did not make the defendant liable. *Ib.*

5. The support sued for was furnished the unemancipated insane daughter of R, who was the pauper removed by the order above referred to. *Held*, that this did not alter the case, for, (a) being unemancipated, she was a member of her father's family and subject to the order of removal, and (b) if not subject to that order, and a transient pauper, still she had never resided in the defendant town, and hence that town was not liable. *Ib.*

PAYMENT. *See* LIMITATION OF ACTIONS 2, 3; MORTGAGE 10.

PERJURY.

The form prescribed in s. 3, No. 29, Acts of 1890, is properly used in an indictment charging the commission of perjury in disclosure proceedings before a justice of the peace after a conviction for intoxication. *State* v. *Baker*, 355.

PLATFORM. *See* NEGLIGENCE 2, 3.

PLEADING.

1. Duplicity and argumentativeness cannot be reached by general demurer, and a special demurrer must point out specifically wherein the duplicity or argumentativeness consist. *Willey* v. *Carpenter*, 212.

2. When a defendant relies upon a series of acts by the plaintiff in justification of an assault and battery, it is not duplicity to set out all these acts hower multifarious they may be. *Ib.*

3. Where such acts are relied upon in justification it should be alleged that they have provoked the assault. *Ib.*

4. The mere fact that two causes of action do not accrue to a plaintiff in the same right, is no reason why they may not be joined in the same suit, for the court can instruct the jury to assess separate damages on the several counts. *Ranney, Admr.* v. *St. J. & L. C. Rd. Co.*, 277.

5. A count for the defendant's neglect, whereby the intestate suffered damages in his lifetime, may be joined with a count for the defendant's neglect resulting in the death of the intestate and brought for the benefit of the next of kin under the statute. *Preston, Admr.* v. *St. J. & L. C. Rd. Co.*, 280.

6. The action being for negligence of the defendant in furnishing its servant with unsuitable cars, a general allegation that the cars were improperly loaded, is sufficient without specifying the particulars. *Ib.*

7. And if the count contains such general allegations in proper form, and also allegations specifying the particulars, which are defective, the latter not being repugnant to the former, the count is not thereby rendered bad, for the special allegations may be stricken out as surplusage. *Ib.*

8. Where a plea in bar to the declaration alleges that the defendant "did no other act or thing" in the premises except to order the arrest and imprisonment of the plaintiff for contempt, which it justifies, this will be a complete answer to the declaration, for if the declaration alleges other trespasses than the arrest and imprisonment, this amounts to a general traverse of those allegations. *Rudd* v. *Darling*, 456.

9. A declaration otherwise good, is not rendered bad on demurrer by a defective allegation which may be rejected as surplusage. *Curtis* v. *Watson & Voodry*, 536.

10. Defects in matter of form cannot be reached by general demurrer. *Rudd* v. *Darling*, 456.

11. The word "premises" as used in pleadings refers to what has been already set forth, and the phrase "by means of the premises" is equivalent to by means of what has been previously detailed. *Parker* v. *Burgess et al.*; 442.

12. An allegation that the plaintiff was obliged to lay out large sums in curing herself of the injuries inflicted by the defendant, is in effect an allegation that she did lay out said sums. *Ib.*

13. Where one clause contains an allegation of place and time, that allegation will be treated as carried into a second clause connected with the first by the conjunction and. *Ib.*

14. A demurrer only reaches those parts of a count which are essential to the action, and wholly immaterial allegations may be stricken out. *Ib.*

15. When language taken in its natural sense can convey no other meaning than that claimed for it by the pleader, it is certain to a *common intent*, and that is sufficient for the allegations in a declaration. *Ib.*

16. *Held*, that the second count alleged in a manner certain to a common intent that the injury to the plaintiff was the indirect and consequental result of the negligence of both of the defendants, and that therefore the action was properly brought against the two jointly. *Ib.*

17. Where a count in trespass is entitled "In a plea of the case," such defect cannot be reached by demurrer. *Parker* v. *Burgess et al.*, 442.

See PRACTICE 6; EXECUTORS AND ADMINISTRATORS 2, 3.

POOR PERSON. *See* PAUPER.

POSSESSION. *See* NOTICE 1.

PRACTICE.

1. The Supreme Court in reversing a case for that the trial court ought, upon the evidence, to have directed a verdict for the defendant, will remand it for a new trial. *Worthington* v. *Cent. Vt. Rd. Co.*, 107.

2. The Supreme Court has no discretion in the allowance of costs accruing in the County Court upon the trial of an appeal from the Probate Court. *Bliss* v. *Little's Estate*, 133.

3. In the absence of any declaration to the contrary, it is to be understood that costs in the Supreme Court are adjudged to the prevailing party. *Ib.*

4. Questions as to costs in the County Court can only be properly brought before the Supreme Court by having the costs taxed and the question decided in the lower court and certified up as a part of the case. *Ib.*

5. Questions as to costs in the Supreme Court must be made while the case is before that court. *Ib.*

6. A defendant cannot have judgment for a balance his due upon the report of a referee where no plea in offset has been filed. *Holmes* v. *Laraway*, 175.

7. An objection, which refers merely to the form of a question, must be defined when made, or it will not be afterwards available. *Foster's Exrs.* v. *Dickerson et al.*, 233.

8. Where an objection is pointed out in the trial court, the excepting party is confined to that ground of exception in Supreme Court. *Ib.*

9. A judgment will not be reversed for error in the admission of testimony, unless the exceptions affirmatively show that the testimony "in the then present aspect of the case" was inadmissible. *Ib.*

10. An expert may be asked to base an opinion upon the testimony of a witness to which he has listened, assuming that testimony to be true. *Ib.*

11. The proponents are not confined to the same questions which the contestants have propounded to their expert witnesses. *Ib.*

12. The excepting party cannot claim that as error which he insisted should be done in the court below. *Ib.*

13. The parties having stipulated that the stenographic minutes of testimony taken on the trial of this cause before the Probate Court might be used in the County Court, if a witness was "unable to attend court by reason of sickness," the fact that a witness had been in attendance on County Court and had there testified, does not prevent the use of his testimony taken in the Probate Court, if the witness is unable to attend court when that testimony first becomes pertinent. *Ib.*

14. The action of the County Court in construing a stipulation between counsel will not be revised by the Supreme Court, if the stipulation is susceptible of the construction put upon it by the court below.

15. It is a sufficient compliance with a request to charge to read it to the jury and tell them that it embodies good law. *Ib.*

16. The court was not bound to tell the jury how much evidence would sustain a verdict upon the ground of undue influence. *Ib.*

17. Where an issue of fact raised by a plea in abatement is found in favor of the plaintiff, judgment in chief should follow; and the Supreme Court, upon sustaining the exceptions of the plaintiff, will give such judgment as the County Court should have given and remand the cause for the assessment of damages. *Jericho* v. *Underhill*, 362.

18. This court will not presume that the County Court made any inference from the facts found upon trial by it, which was not warranted by such facts. *Austin* v. *Bailey & Putnam et al.*, 367.

19. When the record does not disclose what the exceptions taken and allowed in the County Court were, there is nothing for the Supreme Court to consider. *Stilphen* v. *Read*, 400.

20. A petition for a new trial made and denied in the County Court will bar a similar petition in the Supreme Court for the same cause and supported by the same evidence. *Ib.*

21. Where the report of a referee submits to the court a question of law upon the facts found, no exception to the report is needed to raise that question. *Willey* v. *Laraway*, 559.

See PAUPER 1, 2; RULE OF REFERENCE 1, 2, 3; EXCEPTIONS 3; TRIAL 9, 10, 11.

PREFERENCE. *See* INSOLVENCY 1, 2.

PREMISES. *See* PLEADINGS 11.

PRESUMPTION.

The plaintiff having introduced evidence of the value of the horse when received by the defendant, as tending to show its value when converted, and the defendant having introduced no evidence of any change in its condition, the court properly instructed the jury that they were to consider whether its condition probably remained the same. *Stillwell* v. *Farewell*, 286.

See SCHOOLS AND SCHOOL DISTRICTS 1, 2; LIFE INSURANCE 2; PRACTICE 18; RULE OF REFERENCE 5.

PRESUMPTION OF INNOCENCE.

The defendant claimed that the note was a forgery and that the evidence in support of its execution was perjured. *Held*, that the jury should have been instructed that there was a legal presumption against the commission of both of these crimes, which the defendant must overcome. *Stevenson* v. *Gunning's Estate*, 601.

PRIORITY OF LIENS.

Adams held a first mortgage against the property of the Valido Marble Company, of which the husband of the oratrix was treasurer and general manager. The defendants held a second mortgage from that company of the same premises to secure the payment of certain bonds; and this second mortgage contained a stipulation that the mortgagor should keep the premises insured for the benefit of the mortgagees. Adams had begun a foreclosure of his mortgage previously to the making of the defendants' mortgage. After the decree of Adams had become absolute, but in virtue of an arrangement made with him before, the oratrix paid him the amount of his decree and took from him a quit-claim deed of the premises. Her husband acted as her agent in paying the money and taking the conveyance. After taking this conveyance she gave to the Valido Company a written obligation, that she would re-convey to it upon being repaid the amounts advanced by her, and still later executed a conditional deed of

that tenor. By these instruments it was provided that the company should keep the premises insured for her benefit, and that in the event of loss the insurance money might, if the parties agreed, be used in rebuilding the premises. The company did so insure the premises, the buildings were destroyed by fire; and an amount of insurance was paid sufficient to satisfy the entire debt of the oratrix, and was by her passed over to the company to be used in rebuilding, but was not in fact used for that purpose. The husband of the oratrix acted as her agent in settling with the insurance companies. The oratrix did not know of the defendants' mortgage but did know that there were outstanding bonds against the company. *Held*, that the fact that the oratrix suffered the company to retain the insurance money did not work a payment of her debt, nor estop her from asserting the same as a prior lien against the defendants, for

1. While, if the mortgagor covenants to keep the mortgaged premises insured for the benefit of the mortgagee, the mortgagee will have an equitable lien as against the mortgagor upon the proceeds of an insurance actually effected, although not in terms for the benefit of the mortgagee. *Johnson* v. *Valido Marble Co.*, 337.

2. Still such lien will not be good as against a prior mortgagee, who neither has nor ought to have knowledge of the subsequent mortgage. *Ib.*

3. The record of the second mortgage was not constructive notice to the oratrix. *Ib.*

4. Nor was knowledge of the fact that bonds were outstanding sufficient to put her upon inquiry as to how those bonds were secured, or whether they were secured at all. *Ib.*

5. She did not stand affected with the knowledge of her husband since the matters in which he acted as her agent in no way involved the existence of the defendants' mortgage. *Ib.*

6. The checks for the insurance money were made payable to the order of the oratrix, and were by her endorsed and delivered to her husband, as the general manager of the Valido Company. He in fact deposited them to the credit of the oratrix, and drew the proceeds out upon checks signed in blank by her, but without her knowledge that the money had been so deposited or for what purpose the checks were to be used. *Held*, that the rights of the oratrix were not thereby affected. *Ib.*

7. At the time the defendants took their mortgage Adams had an attachment lien against the premises which subsequently became a judgment lien maturing before the decree of foreclosure became absolute. The amount of the judgment was something more than $3000, and the amount of the decree something less than $10,000, the two aggregating over $13,000. The oratrix arranged with her husband, as the manager of the Valido Company, that she would advance $13,000 to pay off these encumbrances and take the security of Adams. Pursuant to this arrangement she paid her husband

$8,000 for the Valido Company, and that company with this and additional money of its own paid the judgment. Later she paid her husband $10,000 more to satisfy the decree. After the decree had become absolute in Adams, he was paid the amount of his decree, being less than $10,000, and thereupon quit-claimed to the oratrix; who agreed to re-deed to the Valido Company, upon re-payment of the entire $13,000. *Held*, that the oratrix thereby acquired a lien superior to the defendants' mortgage to the extent of the entire $13,000. *Ib.*

See MORTGAGE 1, 2, 3, 4.

PRIVITY IN ESTATE. *See* TENANT IN DOWER 2.

PRINCIPAL AND AGENT.

1. A principal may become liable by permitting his agent to hold himself out as having apparent authority. *Winchell* v. *National Express Co.*, 15.

2. Nor was knowledge of the fact that bonds were outstanding sufficient to put her upon inquiry as to how those bonds were secured, or whether they were secured at all. *Johnson* v. *Valido Marble Co.*, 337.

3. She did not stand affected with the knowledge of her husband since the matters in which he acted as her agent in no way involved the existence of the defendant's mortgage. *Ib.*

4. Nor would she be bound by an agreement which he executed in reference to these matters without her authority. *Ib.*

5. He might also testify that he received the checks for the insurance money from the oratrix as the manager and in behalf of the Valido Company, and not as her agent. *Ib.*

PRIVILEGE COMMUNICATION. *See* EVIDENCE 7, 8.

PROBATE COURT.

1. A committee appointed by the Probate Court to make partition of the real estate of a deceased person, must act strictly within the statute or their proceedings will be void. *Re* ROBERT T. PARSONS' ESTATE, 193.

2. Where the estate of the decedent lies in common with other real estate, it is the duty of the committee to first sever the estate which they are to divide from that with which it lies in common, R. L. s. 2259; and the fact that all the parties in interest request them to proceed otherwise, will not justify the committee in departing from the direction of the statute. If they do, their report can have no effect as a decree of the Probate Court, however it may stand as an award of arbitrators. *Ib.*

3. The report of commissioners allowing this claim against the estate of the intestate, duly accepted by the Probate Court, is, under the circumstances of the case, evidence of a valid subsisting debt, notwithstanding

that the orator was both the administrator of A and of the intestate in the making of said allowance. *Randall's Admr.* v. *Randall, et al.*, 419.

See HUSBAND AND WIFE 7.

PUBLICATION. *See* SLANDER AND LIBEL 1, 2, 3.

PUBLIC OFFICER. *See* RAILROAD COMPANIES 9.

PURCHASE MONEY. *See* TRUSTS 1, 2, 3.

RAILROAD COMPANIES.

1. The special charter of a railroad company was made subject to general legislation. At the same session a general law was enacted which modified the provisions of the special charter as to the condemnation of lands, but which did not go into effect until after the special charter. *Held*, that until the general law took effect the company should act under its charter in condemnation proceedings. *Croft* v. *Ben. & Rut. Ry. Co.* 1.

2. Where the charter required that commissioners appointed for the appraisal of land damages should give the land owner fifteen days' notice, and their report shows that they in fact only gave three and that the land owner did not appear, the proceedings are void upon their face. *Ib.*

3. If the company subsequently enters upon the land, and constructs and fences its road upon a parol agreement with the owner that for the sum awarded by the commissioners it shall have the right of way as fenced, and shall leave the owner the use of a spring of water near the track, it will not acquire by occupation title to any land except that between its fences as then located. *Ib.*

4. It is the statutory duty of a railroad company to fence its road as against any animals that are lawfully upon the lands through which it passes. *Smith* v. *Barre Rd. Co.*, 21.

5. Where the land owner contracted to pasture the plaintiff's horse in an adjoining pasture, from which he suffered it to escape upon his meadow, the horse is lawfully in the meadow as regards the railroad company, and the plaintiff may recover if it passes therefrom onto the track and is injured through the insufficiency of defendant's fences. *Ib.*

6. Where a railroad is constructed by one company and subsequently passes into the hands of another, the second company is not, by reason of its possession of the road, liable for any taking of property in the original construction, unless it has entered into the use and possession of the lands so taken. *Wead* v. *St. J. & L. C. Rd. Co.*, 52.

7. If a railroad company occupies a portion of a public highway with its road-bed, an additional burden is thereby imposed upon the land, and the owner of the fee may recover damages for the taking. *Ib.*

8. But when a railroad company, without objection of the municipal authorities, makes a fill upon a public highway, not for the purpose of supporting its road-bed, but to enable the public to have access to its station,

no additional burden is thereby imposed, and no damages can be recovered by the owner of the fee. *Ib.*

9. It appeared that in the construction of the railroad an old highway was occupied, and a new one constructed and used as a substitute, for which the railroad purchased the required lands. It also appeared that the selectmen filed at that time in the town clerk's office a certificate of the survey of the new highway and a vacation of the old one. *Held*, that from these facts it should be presumed that an agreement was entered into between the selectmen and the railroad company for a change in the location of the highway agreeably to R. L. ss. 3379-80, for the filing of the certificate could only be proper after the making of such an agreement, and a public officer acting under the provisions of a public statute will be presumed to have done his duty until the contrary appears. *Ib.*

10. It is the duty of a railroad company to construct and maintain sufficient crossings at points where its railroad intersects a public highway. If in so doing it is necessary to raise the bed of the highway an additional burden is thereby imposed upon the land for which the owner of the fee may recover damages.

11. In the construction of such crossing the railroad company may extend the fill outside the limits of the highway, and must make compensation for the additional land so taken. *Ib.*

12. Under R. L. s. 3370, the orator is entitled, upon the facts found by the master, to damages for the obstruction of travel to his store by the construction of the defendant's railroad. *Ib.*

18. If a railroad company by the construction of its embankments and culverts, collects and discharges surface water in such a manner as to injure adjoining lands, it is liable for the damages thereby ensuing, and although this defendant did not construct this railroad originally, nevertheless if it took and maintained it as so constructed it would be liable as of the date when it went into possession. *Ib.*

14. In estimating the damages the master should consider that a part of the land taken was a public highway and a part a private way. *Ib.*

15. Upon the coming in of an adequate report, a decree should be passed that the defendant is indebted to the orator in damages and costs, for which execution may issue; that the amount of such damages and costs is a lien upon the lands and rights taken, and that the defendant be perpetually enjoined from using and enjoying the same unless payment be made within a time limited. *Ib.*

See MASTER AND SERVANT 1, 2, 3, 4, 5.

RECORD. *See* MORTGAGE 1.

RECORD OF WARNING. *See* SCHOOLS AND SCHOOL DISTRICTS 9, 10.

REFERENCE.

1. Where a rule of reference issued under R. L. ss. 990-992 is returned to the County Court with a finding for the defendant in a sum less than $40, and with nothing to show that the matters submitted exceeded that sum, the County Court is not necessarily deprived of its jurisdiction, but may re-commit the report for a further finding that the matters submitted did exceed that sum. *Potter et al.* v. *Thompson*, 427.

2. Upon the re-commitment of a report for such further findings no notice to the parties of further hearing is necessary, for no further hearing is contemplated. *Ib.*

3. The docket entry showed that the report was re-committed for further hearing. *Held*, that so long as the report was accepted and judgment entered upon it, it must be presumed that the amendment answered the purpose of the re-commitment, and that if counsel were led by the form of the entry to expect a notice of further hearing, the relief would be in the County Court. *Ib.*

4. The parties cannot enlarge the scope of a rule of reference like the above by an agreement among themselves at the time of the hearing. *Ib.*

5. The referees attached to their report the accounts of the parties for the purpose of showing that the matters submitted exceeded $40. The account of the defendant was against but one of the plaintiffs, whereas the finding of the report was against the plaintiffs jointly. *Held*, that this state of things would not vitiate their report, for it would be presumed that there was evidence before them tending to show a joint liability. *Ib.*

REFEREE. *See* INSOLVENCY 4.
RENT. *See* EXECUTION 1.
REVERSION. *See* TENANT IN DOWER 1, 2, 3.
RES JUDICATA. *See* FORMER ADJUDICATION 1.
RESULTING TRUSTS. *See* TRUSTS 1.
RULE OF REFERENCE. *See* REFERENCE 1.

SALE.

1. Goods of the value of more than $40 were purchased orally by S without delivery of any portion or payment of any part of the purchase money. They were to be delivered in B by the vendor, the freight to be paid by the consignee and deducted from the purchase price. The consignee had never applied to the carrier for the goods nor paid the freight. *Held*, that the title remained in the vendor and that the goods could not be attached upon the debt of the vendee. *Agnew et al.* v. *Dumas*, 147.

2. Where intoxicating liquor is ordered by letter by a person in New Hampshire from a firm doing business in Boston, Mass., the sale is to be

treated as made at the place where the goods are delivered. *Damen & Co.* v. *Flint*, 533.

3. Nothing appearing as to the terms of payment, a delivery to an express company for transportation by the direction of the purchaser, is a delivery to the purchaser at the place where such delivery is made. *Ib.*

4. Where the seller delivered the goods to the railroad company consigned to his own order at Windsor, Vt., and took duplicate receipts therefor from the company, which he immediately endorsed to bearer and deposited in the post-office addressed to the purchaser, who afterwards claimed and received the goods upon the same at Windsor, the depositing of the receipts in the post-office in Boston operated as a delivery of the goods there. *Ib.*

See TIMBER ; CONTRACT 3.

SATISFACTION. *See* CONDITIONAL SALE 4.

SCHOOLS AND SCHOOL DISTRICTS.

1. A school district, composed of territory from two or more towns, which has maintained an organization and acted as a school district since 1800, will stand, as to being dissolved, like a union district formed by the concurrent votes of two or more towns. *Lathrop* v. *Sunderland*, 35.

2. Such a district would not be, as the law was in 1886, dissolved by the adoption of the town system by that town in which the school house was located. *Ib.*

3. Under the statutes in force in 1850 the selectmen of a town had no authority to set off private land for a school house lot and award the owner damages therefor, and a writing purporting to be such a set-off is not admissible as evidence upon the question to the title to such lot. *Wheeler et al* v. *School District No. 13. in Barre*, 184.

4. If a grantor includes in a warranty deed premises to which he has no title, the grantee takes thereby only so much as is covered by the title of his grantor ; nor will he acquire by the occupancy of that portion to which his grantor's title extends any title to the balance, so long as that is in the adverse possession of another. *Ib.*

5. Under No. 9, s. 105, Acts of 1888, the prudential committee of one school district has no authority to contract with an adjoining district for the instruction of the scholars of the former unless authorized by a vote of his district in accordance with the provisions of that act. *School Dist. No. 4 in Bethel* v. *School Dist. No. 2 in Stockbridge*, 527.

6. If the prudential committee has no such authority his district is not liable for instruction furnished by an adjoining district under contract with him. *Ib.*

7. The district appointed an agent to settle all the claims against it, having in contemplation this claim by the plaintiff for tuition. *Held*, that the

district would not be bound by the action of the agent, unless there was some appropriate article in the warning for the meeting at which he was appointed. *Ib.*

8. An article, "to see if the district will vote to instruct the prudential committee to hire their scholars schooled in other districts," or "to see if they will raise money to defray the expenses of the same," is not sufficient. *Ib.*

9. The proceedings of a school district meeting are not void because the clerk failed to record the warning in accordance with No. 131, Acts of 1888. *Adams* v. *Sleeper*, 544.

10. Under a warning to see if the district will "vote to raise money to pay the district expenses," a vote to "raise money to support the school and pay the indebtedness of the district," is sufficiently definite. *Ib.*

SELECTMEN. *See* SCHOOLS AND SCHOOL DISTRICTS 3.

SICKNESS. *See* ERROR 4.

SLANDER AND LIBEL.

1. The sending of a libellous communication by mail in a sealed envelope addressed to the person libelled, is not, without some additional fact, a publication of the libel, although the person addressed is a married woman. *Wilcox* v. *Moon*, 450.

2. A husband has no legal right to open the letters of his wife without her consent; and if she voluntarily shows him the libel that is her publication. *Ib.*

3. *Quere*, how it might be if the husband was in the habit of opening his wife's correspondence, and this was known to the sender. *Ib.*

SPECIAL MASTER. *See* TRUSTS 3; EVIDENCE 31.

SPRINGS. *See* WATERS.

STATUTE OF FRAUDS. *See* FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. *See* LIMITATION OF ACTIONS; CONDITIONAL SALE 5.

STENOGRAPHIC TRANSCRIPT. *See* EXCEPTIONS 4.

SUICIDE. *See* LIFE INSURANCE 3.

SUNDAY. *See* ERROR 5.

SUPERVISORS OF INSANE. *See* INSANE ASYLUM.

STATUTES CONSTRUED AND LIMITED.

1. R. L. 4228-4234, disturbing public peace 27
2. R. L. 2958-2979, maintenance of bridges by two towns 30
3. R. L. 501-604, union school districts 38
4. R. L. 3379, 3380, alteration in highway by railroad company 61
5. R. L. 3383, maintenance of public crossing by railroad company .. 62

6. R. L. 3370, obstruction to private way by railroad company..... 62
7. R. L. 3359, condemnation of lands by railroad company..... 63
8. R. L. 1089, trustee process..... 99
9. R. L. 2280, taxation of costs on appeal to County Court..... 134
10. R. L. 724 *et seq.*, trials by special masters in chancery..... 140
11. R. L. 2018, jurisdiction of Probate Court..... 171
12. R. L. 1214, 1215, action of account between partners..... 174
13. R. L. 2259, partition of real estate..... 195
14. R. L. 2268, appellate jurisdiction of County Court from Probate Court..... 196
15. R. L. 997, treating jurors, verdict set aside..... 199
16. R. L. 1678, right of appeal by respondent..... 209
17. R. L. 1676, effect of appeal by respondent..... 210
18. R. L. 1005, right of married women to testify for or against husband..... 220
19. R. L. 996, right of jury to find special verdict..... 279
20. R. L. 828, justice a court of record..... 210
21. R. L. 2140, prosecution of suit by administrator for benefit of third person..... 279
22. R. L. 3800, sale of intoxicating liquor..... 296
23. R. L. 1856, discharge in insolvency..... 303
24. R. L. 1181, attachment of personal property under mortgage..... 312
25. R. L. 1933, trusts in lands..... 332
26. R. L. 2157, 2158, 2455, proceedings of Probate Court against embezzler..... 357
27. R. L. 1111, 1119, liability of trustee for specific articles..... 359
28. R. L. 3814, 3844, concurrent jurisdiction of justice and County Court in offences for intoxication..... 377
29. R. L. 2897, election of supervisors of the insane..... 398
30. R. L. 3, joint authority of three or more persons..... 399
31. R. L. 1707, allegation of ownership in larceny..... 406
32. R. L. 1565-1592, levy of execution upon real estate..... 413
33. R. L. 1597, 1582, rent of real estate set off on execution..... 413
34. R. L. 2844, transportation of paupers..... 417
35. R. L. 1002, competency of witness when one party is dead..... 425
36. R. L. 1003, competency of witness where representative is a party 425
37. R. L. 990-992, rule of reference by justice..... 429
38. R. L. 912, joinder of counts in trespass and case..... 447
39. R. L. 970, limitation of action where defendant is without the state 450
40. R. L. 804, adjournment of County Courts..... 515
41. R. L. 2925-2942, payment of damages upon laying out highway... 542
42. R. L. 1387, exceptions from County to Supreme Court in highway cases..... 543

43. R. L. 322, duty to procure and fill out tax inventory 546
44. R L. 345, preparation by town clerk for listers of abstracts of transfers 547
45. R. L. 521, notice of school meeting 548
46. R. L. 4206, treble damages for trespass 560
47. R. L. 2227, right of dower 561
48. R. L. 1450, tender of damages for tort 558
49. R. L. 3857, amendment of criminal process 570
50. R. R. 974, new promise as availing statute 498
51. R. L. 1966, record of chattel mortgage 503
52. R. L. 3053, collection of highway taxes 509
53. Act of 1884, No. 18, highways and bridges 30
54. Act of 1882, No. 16, State aid for highways 30
55. Act of 1886, No. 16, s. 7, amendment of act relating to State aid for highways 30
56. Act of 1884, No. 18, s. 7, same 31
57. Act of 1882, No. 16, same 31
58. Act of 1833, No. 11, appeals from Probate Court 134
59. Act of 1878, No. 17, appointment of trial masters in chancery 140
60. Act of 1880, No. 62, liability of towns for damages on highway 145
61. Act of 1882, No. 13, same 145
62. Act of 1886, No. 45, s. 2, competency of husband and wife as witnesses 220, 517
63. Act of 1882, No. 41, sale of intoxicating liquor 296
64. Act of 1890, No. 29, s. 1, indictments for perjury 356
65. Act of 1888, No. 86, appointment of supervisors of insane 398
66. Act of 1882, 1884, No. 48, s. 4, care of insane persons not dangerous 399
67. Act of 1882, No. 86, amendment of criminal process 406
68. Act of 1884, No. 139, levy of execution on real estate 413
69. Act of 1890, No. 39, same 414
70. Act of 1884, No. 140, s. 2, property rights of married woman 455
71. Act of 1884, No. 226, ss. 48, 74, Municipal Court of Bennington 460
72. Act of 1888, No. 9, ss. 105, 106, 131, instruction in other school districts 529
73. Act of 1882, No. 86, s. 2, amendment of criminal process 570
74. Act of 1884, No. 12, repairing of highways 509
75. Act of 1884, No. 8, taxes paid under protest 510
76. R. S. United States, s. 5243, payment by national bank when insolvent 392

TAXES. *See* GRAND LIST 1.

TAX WARRANT. *See* FALSE IMPRISONMENT.

TENANT IN DOWER.

1. A tenant in dower is liable to the reversioner for waste done the premises by a stranger, and may therefore maintain an action against a stranger for an injury to the reversion. *Willey* v. *Laraway*, 559.

2. A judgment in such an action would bar an action for the same injury by the reversioner, for the tenant and reversioner are privies in estate. *Ib.*

3. The plaintiff was the widow of Silas Willey. Volney Willey, the heir of Silas Willey, conveyed to the defendant the east half of lot 31, "except five acres more or less out of the south-east corner of said lot heretofore set off as a part of the widow's dower." In fact more than fourteen acres of said lot had been set out as dower. The report found that the defendant had cut a small quantity of lumber on the five acres excepted in the deed, and a much larger quantity on the nine acres not excepted, and that there was still ample timber for the estovers of the widow. *Held*, that the defendant was liable to the plaintiff for the timber cut upon the five acres, but not for that cut upon the nine acres, for as to that he was himself the reversioner, and the only injury was to the reversion. *Ib.*

TENDER.

1. The plaintiff is under no obligation to furnish the defendant with a statement of his costs, and that he neglects or refuses to do so is no excuse for an insufficient tender. *Willey* v. *Laraway*, 566.

2. In determining whether a tender has been seasonably made under R. L. s. 1450, both the day of the tender and the first day of the term should be excluded. *Ib.*

3. In case of a tender for damages by a trespass, the defendant will not be relieved from further costs unless the County Court affirmatively finds that he acted in good faith. It is not enough that no fact appears in the referee's report inconsistent with that idea. *Ib.*

THREATS. *See* EVIDENCE 42.

TIMBER.

The defendants, being the owners in fee of certain lands, let W into possession under an agreement to convey upon the payment of a certain sum. Before payment W severed lumber from the premises with the knowledge of the defendants and sold it to the plaintiff. The defendants notified the plaintiff that they claimed the lumber before he paid for it. *Held*, that the lumber belonged to the defendants and that they might take possession of it. *Hilliard* v. *Dean et al.*, 292.

See EQUITY 9.

TREATING JURORS. *See* VERDICT 1.

TRIAL.

1. The court need not answer a request not warranted by the evidence, although it contains a correct proposition of law. *Winchell* v. *National Express Co.*, 15.

2. Where an issue has been found in favor of an excepting party, no reversable error can be predicated in respect of that issue. *Good* v. *Knox et al.*, 97.

3. The trial court is not bound to instruct the jury in a given particular, even though that instruction be a correct exposition of the law, unless the evidence in the case requires it. *Ib.*

4. Where a party, after having excepted to the action of the court in overruling his motion for a verdict upon the evidence, puts in further testimony, he thereby waives the exception. *Paine* v. *Webster*, 105.

5. It is error to submit an issue to the jury which there is no evidence tending to maintain. *Worthington* v. *Cent. Vt. Rd. Co.*, 107.

6. The County Court may permit the plaintiff, upon trial of an appeal from the allowance of commissioners, to raise the *ad damnum* of the declaration filed in the Probate Court, where the claim presented to the commissioners and that tried in the County Court are identical. *Maughan* v. *Burns' Estate*, 316.

7. The trial court may, under No. 86, Acts of 1882, allow an indictment for larceny to be amended on trial by changing the name of the person in whom the ownership is laid. *State* v. *Casavant*, 405.

8. It is reversible error if counsel, after a letter has been excluded, persists, against the objection and exception of the other side, in offering the separate parts of it in such a way as to get its contents before the jury. *Rudd* v. *Rounds*, 432.

9. The court might properly direct a verdict for the amount so paid. *Taylor* v. *Coolidge*, 506.

10. If the defendant, without introducing any evidence upon its own part, moves for a verdict at the close of the plaintiff's evidence, it thereby admits the truth of such evidence, and the case should be disposed of accordingly. *Walcott* v. *Metropolitan Life Ins. Co.*, 221.

11. The evidence of the plaintiff having shown the death of the insured and the making of the requisite proof. *Held*, that the court should have directed a verdict in her favor for the full amount of the policy. *Ib.*

See PRACTICE 17; BURDEN OF PROOF 1; CHARGE OF COURT 3, 4, 5; EXCEPTIONS 3.

TROVER. *See* MODIFICATION 1.

TRUSTEE PROCESS.

1. The service of trustee process impounds in the hands of the trustee, to await the determination of the suit, the property of the defendant sub-

ject to trustee process which is then lawfully in the possession of the trustee. *Deno* v. *Thomas*, 358.

2. If the defendant takes such property from the possession of the trustee he is liable in nominal damages at least. *Ib.*

3. And he is liable in actual damages to the amount of a judgment obtained against and paid by the trustee in the trustee suit, not exceeding the value of the property. *Ib.*

4. Nor is it material that the trustee suffers this judgment by default, provided he would have been held chargeable had he appeared and disclosed. *Ib.*

TRUSTS.

1. Where upon the purchase of real estate the conveyance of the legal title is made to one person, while the consideration is paid by another, a trust thereby results by implication of law in favor of the person who pays the purchase money, and the facts necessary to raise such trust may be shown by parol. *Williams, Admr.* v. *Wager et al.*, 326.

2. Nor does it alter the rule that the one to whom the conveyance was made is dead. *Ib.*

3. The evidence of such a trust must be clear and satisfactory, but by this it is only meant that the trier of the case must be reasonably satisfied of the fact which the evidence tends to prove; and when the case is referred to a special master to find and report the facts, his finding is conclusive upon the court, certainly unless he reports the evidence upon which that finding is based. *Ib.*

4. A resulting trust cannot be raised by any transactions between the parties subsequent to the passing of the legal title, but it is not necessary that the entire purchase money should be paid at the time of the conveyance. It is enough if the one setting up the trust assumed to pay as a part of the original transaction and subsequently did pay the consideration. *Ib.*

5. The owner of property may create in himself a voluntary trust in respect thereto by any act or declaration which unequivocally shows that he holds such property in trust for the beneficiary. *Conn. River Savings Bank* v. *Albee*, 571.

6. It is not necessary that the beneficiary should know of or assent to such trust. *Ib.*

7. When a voluntary trust has once been perfected it cannot be revoked or altered by the donor, unless this right was reserved by the terms of its creation. *Ib.*

8. A father deposited in a savings bank a sum of money to the credit of his son, and received a deposit book in which the son was named as the depositor and he himself as trustee. The son did not know of the deposit and the father kept the book among his papers until his death. *Held*, that

a voluntary trust was thereby created in favor of the son, unless some fact or declaration appeared to show a contrary intent. *Ib.*

9. That the father made the deposit in the name of the son to escape taxation is not such a fact. *Ib.*

UNDUE INFLUENCE.

1. In order to set aside a will for undue influence it must appear that the influence was exerted upon the very act of making the will. *Foster's Exrs.* v. *Dickerson et al.*, 233.

2. And the influence must proceed to that extent that the free agency and independence of the testator is overcome, and he is constrained to do what is really against his will. *Ib.*

See EVIDENCE 17; PRACTICE 16.

UNION DISTRICT. *See* SCHOOLS AND SCHOOL DISTRICTS 1, 2.

VERDICT.

Whether or not tobacco be "victuals or drink," (in the opinion of Taft, J., it is both) the furnishing of it to a juryman by way of treat is within the purview of R. L. s. 997; and if a party after trial in the County Court assembles the jurors and pays the cigars, a verdict in his favor will be set aside. *Baker, Apt.* v. *Jacobs*, 197.

See PAUPER 1, 2.

VESTED RIGHTS. *See* HIGHWAYS AND BRIDGES 2.

WAIVER. *See* CHATTEL MORTGAGE 3, 4; MOTION IN ARREST 1; CONSIDERATION 3, 4; CONDITIONAL SALE 3.

WARNING. *See* SCHOOLS AND SCHOOL DISTRICTS 8, 9, 10.

WATERCOURSE.

1. A land owner may change or modify the flow of a stream across his own lands, but not in such a way as to injure other lands upon the same stream. *Ames* v. *Dorset Marble Co. et al.*, 10.

2. Where the deposits from two mills situated one above the other upon a stream together cause injury to adjacent lands, their owners are not liable as joint tort feasors, but each is severally responsible for the proportion of the damages caused by his mill. *Ib.*

3. Where the water, flowing in a watercourse, spreads out over the surface, ceases to have and never returns to a defined channel, the character of a watercourse is lost. *Hawley et al.* v. *Sheldon*, 491.

WATERS.

1. The petitioner was the owner of certain large springs, the water from which ran in well defined courses across his lands. The petitionee took

these, improved them and used all the water in connection with its water system. *Held*, that the petitioner was entitled by way of damages not merely to the value of the water to him as it ran, but also to the value of the springs for the purpose of improvement and development. *Harwood* v. *Village of West Randolph*, 41.

2. But what the springs would have possibly been worth for the purpose of supplying the petitionee itself and its inhabitants with water, had it constructed no system of its own, is not a proper basis for estimating the damages, the owner having contemplated but never actually undertaking such an enterprise. *Ib.*

WILL. *See* EVIDENCE 10, 11, 25, 26, 27, 28; EQUITY 6, 7, 8; UNDUE INFLUENCE 1, 2; WITNESS 11.

WITNESS.

1. A party calling his adversary as a witness to fix a several liability upon his co-defendant, cannot impeach him by showing former contradictory statements, however it may be when the witness is called to fix liability upon himself. *Good* v. *Knox et al.*, 97.

2. *Held*, that the court did not in effect instruct the jury that the testimony of a subscribing witness as to the capacity of the testatrix was to be given any greater weight than that of other witnesses having the same means of knowledge. *Foster's Exrs.* v. *Dickerson et al.*, 233.

3. Whether the witness has such knowledge is for the determination of the trial court, and the determination of that tribunal will be conclusive unless it appears that there was error in law in making it. *Maughan* v. *Burns' Estate*, 316.

4. The intestate, being indebted to A in the sum of $1000 evidenced by a promissory note, conveyed, without consideration, all his property to the defendants. This note was subsequently allowed against his estate and the orator sued to recover a sufficient amount of the property so conveyed to satisfy the allowances against the estate and the expenses of administration. The defendants claimed in defense that at about the time of the conveyances, the intestate loaned T one thousand dollars upon an agreement between himself, A and T that T should satisfy said loan by paying A the amount due her, and that A consented to said arrangement, and agreed to take T as her debtor. *Held*, that, A having deceased, T was not a competent witness, for that this tripartite agreement was in issue and on trial. *Randall's Admr.* v. *Randall et al.*, 419.

5. Nor is the widow of the intestate a competent witness to that agreement, she being an annuitant under the conveyances which it is sought to impeach, and a party to the suit. *Ib.*

6. When the wife is a party in interest, though not of record, the husband is not a competent witness. *Banister* v. *Ovitt*, 580.

7. The action being for the conversion of certain hay by feeding it out, a person who claimed to own the hay by reason of the fact that it was cut upon her land, and by whose direction the defendant fed it to her stock supposing it to be hers, is a party in interest. *Ib.*

8. The plaintiff claimed title under a chattel mortgage. *Held*, that the contract evidenced by this instrument was collateral to the issue on trial, and that the plaintiff might be a witness in his own behalf notwithstanding that the mortgagor was dead. *Ib.*

9. The wife of a co-partner is disqualified to the same extent in a suit against the co-partnership that she would be were the suit against her husband alone. *McEwen* v. *Shannon & Co.*, 583.

10. One who is an expert in the use of the microscope, but not in the matter of hand-writing may tell the jury what he sees upon the examination of a written instrument with the microscope, but may not give an opinion as to whether a certain figure has been altered and how. *Stevenson* v. *Gunning's Estate*, 601.

11. A legatee is a competent witness to the capacity of the testator. *Foster's Exrs.* v. *Dickerson et al.*, 233.

See EVIDENCE 11, 32; CONTEMPT OF COURT 1; HUSBAND AND WIFE 11.

WITNESSED NOTE. *See* LIMITATION OF ACTIONS 1.

Ex. E. No. F.

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